Supreme Court, U. S.
FILED
NOV 19 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-121

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

BILLY GALE HENRY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 25, 1979
CERTIORARI GRANTED OCTOBER 1, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-121

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

BILLY GALE HENRY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

	Page
Relevant Docket Entries	1
Transcript of Proceedings, December 27, 1972	9
Transcript of Proceedings, March 7, 1973	11
Testimony of Robert H. Woodcock (bank employee)	11
Testimony of Ruth Bridges (bank employee)	14
Testimony of Alvin Owens (bank employee)	16
Testimony of John Peterson (employee of nearby business)	18
Testimony of Edward Benjamin Nichols (inmate at Norfolk City Jail)	28
Testimony of Joseph Elbert Sadler (inmate at Norfolk City Jail)	31
Testimony of Steven D. Slayton (employee of manufacturer of radio receivers)	37
Testimony of Clarence E. Phillips (FBI Agent—fingerprint expert)	41
Testimony of Eldon Bryant (FBI Agent—expert in radio matters)	42

	Page
Testimony of Gaynor Holiday (owner of premises at 6420 Wailes Ave., Norfolk, Virginia)	44
Testimony of Barbara Lorraine Henson (neighbor of Wailes Ave. premises)	46
Testimony of Nicholas V. O'Hara (FBI Agent)	48
Jury Verdict	49
Judgment and Sentence	49
Petition for Writ of Habeas Corpus (§ 2255 Motion), August 28, 1975	51
Excerpts from Amendment of Complaint (§ 2255 Motion), June 27, 1977	71
Letter from Chief Judge Richard B. Kellam to Roger T. Williams, Assistant United States Attorney, August 30, 1977	82
Affidavit of FBI Special Agent Nicholas V. O'Hara, September 7, 1977	84
Order allowing certiorari	86

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

CR. 243-72-N

THE UNITED STATES

vs.

BILLY GALE HENRY

DOCKET ENTRIES *

DATE	PROCEEDINGS
1972	
Nov. 15	Indictment returned and filed at Alexandria, Va. and on mo. of U.S. ordered transferred to the Norfolk Div. for docketing and trial.
Nov. 28	COURT PROCEEDINGS (JAM)—U.S. appeared thru Mr. Hunter Sims, AUSA. Deft. present (in custody) without counsel. Court explained right to counsel. Counsel desired. Deft. sworn; affidavit exec. Court directed appt. of counsel. Deft. remanded to Marshal's custody. LATER: Mr. Sims, deft, and Mr. Ralph Rabinowitz, c.a. counsel, appeared. Copy of indict. prev. furnished to deft. Deft. waived formal arr. Deft. plead not guilty. Set for trial on 2/1/73 with jury at 10 a.m. Deft. remanded to Marshal's custody.
Nov. 27	CJA 20 appointment & voucher for counseling services (Ralph Rabinowitz) entered & filed. JAM, Judge. Copies dist.
Dec. 27	COURT PROCEEDINGS. Deft. present (in custody) with his c.a. counsel, Mr. Ralph Rabinowitz. Came on for hearing on motions. * * * RE MOTION FOR DISCOVERY AND INSPECTION—items 1 thru 5—not applicable (no wire tap) * * * items 24, 25 & 26—statements of accused will be furnished.

* Entries deemed irrelevant by the parties have been omitted.

DATE	PROCEEDINGS

1973

Jan. 11 Defendant's motion for a continuance, filed.

Jan. 11 Motion for continuance granted (see notation on motion by WEH). Case removed from docket for 2/1/73 * * * and, re-set on merits (jury) on 3/7/73.

Mar. 7 COURT PROCEEDINGS. Jury ret. with the following verdict: "We, the Jury, find the deft. guilty as charged and of assaulting or putting in jeopardy the life of Robert Woodcock in the commission of such offense as charged in the Indictment, Signed Robert A. Combs, Foreman." dated March 7, 1973. Deft. mo. to set aside Jury verdict, was denied by the Court. Deft. desired to be sent. today. Probation Report waived by deft. Comments of counsel heard. Comments of deft. heard. Nothing further offered in delay of Sentence. SENTENCE: It is the Judgment of the Court that deft. be committed to the custody of the Atty. Gen. or his duly auth. rep. to be confined for a term of 25 yrs., unless sooner released by oper. of law. Court advised deft. of his right of appeal within 10 days. Deft. stated he wished to appeal. Notice of appeal exec. and filed. Court directed transcript be prepared at Govt. expense.

Mar. 8 Judg. & Commit. order entered 3-7-73 and filed.

Mar. 7 Notice of Appeal exec. by deft. filed. (F. P.)

Mar. 8 Notice and copy of notice of appeal forwarded to deft.; deft's atty.; Charles Barnes, Court Reporter; and U.S. Atty.

Mar. 8 Conformed copies of notice of appeal and docket entries forwarded to Clerk, U.S. Court of Appeals.

1975

May 13 Letter from deft. treated as a motion for reduction in sentence filed. Motion denied by the Court. Copy of letter with denial. fwd. to deft.

DATE	PROCEEDINGS

1975

Aug. 28 Copy of Memo. Order re C/A 75-453-N placed in file.

Oct. 28 Case filed mailed to U.S. Court of Appeals with record on appeal C/A 75-453-N

1976

Dec. 16 Defendant's motion for new trial filed.

1977

Mar. 31 Advanced opinion received from Court of Appeals filed (D.C. affirmed in part and reversed in part and remanded for further proceedings.)

Apr. 25 Cert. copy of Judgment order affirming in part and reversing in part D.C. Case remanded with directions for further proceedings; copy of Opinion recd. and filed.

Oct. 11 Copy of Memorandum (C/A 75-453-N) that motion for new trial filed in criminal action and the habeas corpus proceedings are consolidated and are dealt with in this order (motion for new trial DENIED), received & filed.

1978

Dec. 27 Advanced copy of opinion received from the Court of Appeals and filed. (See C/A 75-453-N).

1979

Apr. 9 Cert. copy of Judgment order REVERSING 2255 Motion & REMANDING with instructions etc. received from the Court of Appeals. Copy of opinion received and filed.

Apr. 30 Defendant's motion for release before trial filed.

May 23 COURT PROCEEDINGS. Deft. not present. Matter came on for he on deft's motion to set bond. Court takes matter under advisement.

DATE	PROCEEDINGS
1979	
June 20	Def't motion to dismiss the charge filed.
June 26	ORDER denying deft's request to be released on bond pending outcome of Supreme Court decision entered and filed.
June 26	FBI report on deft. filed.
July 5	Notice of appeal from Order dated June 25, 1979 denying deft. bail pending outcome of the U.S. application for a Writ of Certiorari, filed. (F.P.)
Sept. 24	Advanced copy of opinion received from the Court of Appeals AFFIRMING D.C. filed.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

75-2142

UNITED STATES OF AMERICA

v.

BILLY GALE HENRY

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
10/29/75	Appeal docketed.
4/28/76	Appellant's "supplement to the record" filed.
9/27/76	Appellant's "Motion to Supplement the Record, Motion for New Trial, and/or Motion for an Evidentiary Hearing" filed.
11/19/76	Appellant's Motion for a New Trial and/or Hearing on Newly Discovered Evidence filed.
11/19/76	Appellant's motion for a New Trial—Rule 33, Newly Discovered Evidence filed.
3/29/77	Judgment of the district court affirmed in part, reversed in part, and case remanded for further proceedings. Judgment filed.
4/19/77	Certified copy of the judgment and printed copy of the opinion transmitted to the Clerk of the District Court at Norfolk, Va.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

77-2338 & 2255

UNITED STATES OF AMERICA

v.

BILLY GALE HENRY

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
10/28/77	Appeal docketed.
10/28/77	Amendment of the Complaint by Plaintiff, Record on Appeal in previous case No. 75-2142; all in one envelope, filed.
12/1/77	Appellant's motion for bond filed.
1/12/78	Appellant's memorandum in support of bail application filed; transmitted to panel.
3/20/78	Appellant's suggestion of counsel to be appointed and letter supporting request for bond filed.
3/23/78	ORDER denying motion for bond, filed.
3/28/78	ORDER appointing counsel (CJA Form 20), filed.
5/5/78	MOTION for expedited scheduling of argument and memorandum in support of motion, filed.
5/17/78	Answer to motion for expedited appeal, filed.
5/17/78	ORDER expediting case for argument at the July 1978 session, filed.
10/4/78	Cause argued before Judges Winter, Butzner and Russell, Circuit Judges, and submitted.
12/26/78	Opinion filed. Judge Butzner concurring. Judge Russell dissenting.

DATE	FILINGS—PROCEEDINGS
12/26/78	Judgment of the District Court reversed and remanded.
1/5/79	MOTION of appellee for extension of time to file petition for rehearing to February 15, 1979, filed.
1/8/79	ORDER extending time to file petition for rehearing to February 15, 1979, filed. ecr copies to Ritchie, Chang, Williams.
1/10/79	Opposition for extension of time to file petition for rehearing, filed.
1/26/79	MOTION for release pending government's efforts to obtain review filed.
2/6/79	MOTION to extend time to 2/8/79 to file response to motion for release pending review, filed. MOTION GRANTED.
2/7/78	Response in opposition to appellant's motion for release on bond filed.
2/16/79	SECOND MOTION for extension of time to file a petition for rehearing, filed.
2/26/79	ORDER denying the motion for release pending the government's motion to obtain review, filed.
2/26/79	Supplemental memorandum in support of application for bail pending resolution of government's efforts to review the court's decision, filed.
2/27/79	ORDER granting the government's second extension of time to file a petition for rehearing to 3/1/79, filed.
3/1/79	Petition for rehearing and suggestion for appropriateness for rehearing en banc, filed.
3/9/79	MOTION for leave to file answer to petition for rehearing, filed. MOTION GRANTED.
3/30/79	ORDER denying petition for rehearing, filed.

DATE	FILINGS—PROCEEDINGS

4/6/79 Certified copy of the judgment and printed copy of the opinion transmitted to the Clerk of the District Court at Norfolk, Va.

7/13/79 MOTION (C-81) of A for release pending review under Rule 23(c) FRAP, filed.

7/25/79 RESPONSE of appellee to motion for release pending review, filed.

8/2/79 ORDER denying the motion for release pending review, filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Criminal Action No. 243-72-N

UNITED STATES OF AMERICA

v.

BILLY GALE HENRY

Proceedings had in the above-entitled cause on the 27th day of December, 1972, at 2:16 p.m., in the United States District Court for the Eastern District of Virginia, Norfolk Division, at Norfolk, Virginia, before the Honorable Richard B. Kellam, United States District Judge.

[2] APPEARANCES:

For the Government:
Hunter W. Sims, Esquire,
Assistant United States Attorney,
409 Federal Building,
Norfolk, Virginia 23510.

For the Defendant:

Ralph Rabinowitz, Esquire,
1224 Maritime Tower,
Norfolk, Virginia 23514.

* * * *

[17] [MR. SIMS]:

Number 20: I think we've gone over that. They're not entitled to a list of the prosecution witnesses.

Number 21, I think, is 16(b) of the Federal Rules of Criminal Procedure. We will give them the test results, and the physical evidence may be viewed at the FBI Headquarters.

Number 22 calls for Jencks Act material. That will be furnished on the day of the trial.

Number 23 seems to be the Brady motion rephrased. We'll furnish the—

THE COURT: Covered by 13 as well.

MR. SIMS: Yes, sir.

THE COURT: All right.

MR. SIMS: We'll furnish statements of the accused, if any.

There are no statements of accomplices.

[18] We will not furnish investigative reports from the FBI or any other law enforcement agencies. I don't think that we are required to under Rule 16 or any other discovery process.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DVISION

Criminal Action No. 243-72-N

UNITED STATES OF AMERICA

v.

BILLY GALE HENRY

Proceedings had and evidence taken in the above-entitled cause on the 7th day of March, 1973, at 10:30 a.m., in the United States District Court for the Eastern District of Virginia, Norfolk Division, at Norfolk, Virginia, before the Honorable Richard B. Kellam, United States District Judge, and a jury.

[2] APPEARANCES:

For the Government:

Hunter W. Sims, Esquire,
Assistant United States Attorney,
Eastern District of Virginia,
409 Federal Building,
Norfolk, Virginia 23510.

For the Defendant:

Ralph Rabinowitz, Esquire,
1224 Maritime Tower,
Norfolk, Virginia 23514.

* * * * *

[5] ROBERT H. WOODCOCK,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q State your name, please, sir.
A Robert H. Woodcock.
Q How are you employed, Mr. Woodcock?
[6] A As the head teller of the Janaf Branch, United Virginia Bank/Seaboard National.
Q Were you so employed on the 28th day of August 1972?
A Yes, sir.
Q Are the deposits of that bank insured, sir?
A Yes, sir.
Q How are they insured?
A Federal Deposit Insurance Corporation.
Q I hand you now a document.
Would you explain that document, please?
A What was your question?
Q Could you explain that document to the jury, please?
A This is a certificate that the bank is covered by the Federal Deposit Insurance Act, carrying a serial number.
MR. SIMS: I'd offer this as Government's Exhibit Number 1, your Honor.
MR. RABINOWITZ: No objection, your Honor.

* * * * *

[10] [MR. SIMS]: Did anything unusual occur in the bank shortly after 9 o'clock on the morning of August 28th?
[MR. WOODCOCK] After we listed these bags—
There are certain ones the bank has a type of contract that the bank under supervision of two people open the bags and take out the contents and make the deposits for the customer. All of that type of bags was removed from the shelf and placed in the head teller's cage.
Shortly after 9 o'clock, when the bank was opened, two persons, disguised in green coverals, theatrical type masks and gloves, entered the bank. One of these persons vaulted over the counter of the head teller's cage, struck

me on the head with an object, then marched me out of that cage, out into the lobby, where I could be observed by the other person in the lobby. This person then went back to the cage and proceeded to stuff these night-deposit bags into some Army type duffel bags, after which they were dragged out of the bank by these two people, and they departed.
Q Okay. Let's call the two robbers Number 1 [11] and Number 2.
Were you able to determine—
Number 1 is the fellow that jumped over the teller's cage.
Were you able to determine his general characteristics at all?
A The only difference in characteristics that I could determine was the one who came into the cage appeared to be an inch or two inches taller than the one standing near the door.
Q Did they carry any weapons or did you observe?
A The person who came into the cage had a pistol in his right hand and an object in his left hand that I couldn't discern, and the person in the lobby had a gun, holding control over the employees in the lobby.
Q When you were hit on the head, did that cause you to bleed at all?
A Yes.
Q Did you seek any help?
A The ambulance service came, took me to the Norfolk General Hospital, where I understand 10 stitches were taken in my head.
Q Now, Mr. Woodcock, after the bank robbery, did you make a determination of the bank bags that were [12] taken—the night-deposit bags?
A Yes, sir.
All bank bags remaining were checked against this set of records, thereby determining those that were missing.
Q And, so, you are able to determine which ones—
A Yes, sir.
Q —were taken?
A Yes, sir.

Q Okay.

MR. SIMS: At this time I would move for the introduction of the list prepared by Mr. Woodcock.

MR. RABINOWITZ: No objection, if your Honor please.

THE COURT: All right, sir.

MR. SIMS: Government's Exhibit Number 2.

THE COURT: It's admitted.

* * * * *

[26] RUTH BRIDGES,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SIMS:

Q State your name, please.

A Ruth Bridges.

Q How are you employed, Mrs. Bridges?

A I'm a credit clerk and vault attendant at the Janaf Branch of United Virginia.

Q Were you so employed on the 28th day of August 1972?

A Yes; I was.

Q What city is the Janaf Branch of the United Virginia Bank in?

A Norfolk.

Q Would you relate anything unusual that occurred in the morning of the 28th of August?

A Yes.

We were held up.

Q Would you tell the jury at this time the circumstances surrounding that robbery?

A Well, I was sitting in the back room at my desk, and I heard what I think were shots and screaming. So, I got up from my desk, and as I went to the front of the [27] bank, the front part of the bank, where the teller's cage was, a man came with Mr. Woody and another girl, screaming, and he was full of blood.

Q Did you make any observation as to the people robbing the bank?

A Well, there was one man at the door, to the right, covering the customers, and this man, other man, came from Mr. Woody and the lady toward me.

Q Was he armed—

A I think—

Q —the man standing in the lobby?

A Yes; the man standing in the lobby had a gun on the customers, and the other man—I'm not sure if he had a gun in his hand when he came toward me or not.

Q Now, this other man that came toward you—what did he do?

A Well, the other girl was screaming so much and started running, and he started chasing her, and she came back and either passed out or fell at my feet, and then he told me to get out in the lobby and sit at the desk, and I did.

Q And during this activity the other robber stood in the—

A At the door.

Q —lobby?

[28] A (The witness nodded affirmatively.)

Q Okay.

Could you make any determination as to the height of these two individuals?

Was one taller than the other?

A Yes. I believe the one that had Mr. Woody was taller than the other man.

Q Than the man that stood in the lobby?

A The door.

Q Okay.

Were you able to describe what these men were wearing?

A Yes.

Coveralls and masks, hideous masks, and gloves, and sneakers. One man had sneakers.

* * * * *

[35] ALVIN OWENS,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SIMS:

Q State your name, please, sir.
A Alvin Owens.
Q How are you employed, Mr. Owens?
A I am with the United Virginia Bank/Seaboard National.
Q On the 28th of August 1972 were you employed with that bank?
A Yes, sir; I was.
Q Did any—
A At the Janaf Shopping Center Branch.
Q Did any unusual event occur on the morning of the 28th of August?
A Yes, sir.

Very shortly after closing two men entered the bank, and—

Q Pardon me. You said "closing".
A Opening.

I'm sorry.

Q What time was this?
A Somewhere between nine and 9:05.

[36] Q Okay.

A They came in, and they were in a frenzy, very excited acting, and they were wearing masks and coveralls and such and carrying guns, and they ran across the lobby, hollering, one of them stopping in the middle of the lobby, the other proceeding to the head teller's cage, which is at the other end of the lobby, at which time he put his hands on the cage and pounded on it and jumped over it and struck the head teller on the head, evidently with a gun,—I'm not sure what he struck him with, but I think it was a gun—at approximately which time I heard a shot. He proceeded to move everyone away from the area and get them out into the lobby and scrape

up all the night-depository bags available, and then he came out the front with a bag filled with the night-deposit bags, dragging it out the door, and then they left the bank.

Q How long did this robbery last?
A It couldn't have been over five or 10 minutes.
Q Could you make a determination as to height, weight and race of the two men that entered the bank?
A Right.

They were both white men. I could tell this because the masks they were wearing were slit down the side of the neck and I could see the color of their necks.

[37] The one that stopped in the middle of the lobby was a shorter, stocky guy. I'd say something under six feet; just a little under six.

The one that bounded over the head teller's cage was about six or a little better.

Q Were these men armed?
A Yes, sir.

The one in the middle of the lobby was pointing a pistol at me. It looked to be a .38 special, just from the diameter of the hole in the barrel, and the one that went over the head teller's cage was carrying what sounded to be a .32 when it fired.

Q Did you observe whether the man in the lobby was wearing any particular shoes?
A Yes.

The man in the middle of the lobby was wearing blue sneakers. I remember them vividly, because I had to do something to keep my mind occupied to keep from panicking under the stress, and so, I observed him very carefully since he was the closest one to me. He was wearing blue sneakers, a green OD-colored set of coveralls and a flesh-colored Halloween type mask which covered his complete head.

Q How about the other fellow, the one that bounded over the teller's cage?

[38] A I could tell he was wearing a rubber mask, Halloween mask, of the same type, with hair on it and a moustache on it, and green coveralls of the same type, but I did not concentrate on his feet or any other part of him.

* * * * *

[47] JOHN PETERSON,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q State your name, please, sir.
A My name is John Peterson.
Q How are you employed, Mr. Peterson?
A As a commercial account executive for Allstate Insurance Company.
Q Were you so employed on the morning of the 28th of August 1972?
A I was.
Q Where is your office?
A Janaf Shopping Center.
Q How far away is your office from the Janaf Branch of the United Virginia Bank?
A Maybe 200 feet.
Q On that morning did you have anything strange occur in the vicinity of your company?
A Yes; we did.
On that—
Should I relate—
Q Yes, sir.
A —what it was?
[48] Q Please.
A On that particular morning we had a very excited individual run in the back door of our office, yelling: "The bank's being robbed. The bank's being robbed. Somebody please get the license number of the getaway car."
At that point I ran out the front door of the office, past High's Ice Cream, almost to the bank, and got the license number of the car.
Q What was that number?
A The number was BBL-373.

Q Was that a Virginia license number?
A Yes; it was. It was the black background with the white numerals.
Q Did you tell anyone about this licence plate number?
A Yes; I did.
I immediately headed back as an individual came out of the bank, and an individual in the car, observing me, started honking the horn so as to indicate he had a problem, but I related that number immediately to one of the people in the office, who then immediately called the police.
Q Did you get a description of the car?
A Yes.
[49] Q What is that?
A It was a tan Falcon.
Q Could you describe the man that sat in the car or the individual?
A I described the man in the car as a white male—at the time with long blond hair and a sun visor.
Q Now, when you observed someone coming out of the bank, how many people did you observe?
A I noted the first man came out of the bank. I was about 60 feet from him, and I made a hasty retreat back to the office with the license number information, so on and so forth. At that point I turned around to give that information to the person who was making the call to the police. As I turned back around, I observed a third man get into the car.
Q Were you able to identify any one of the men coming out of the bank?
A Yes.
I identified the first man who came out of the bank.
Q Do you recall his name?
A Mr. Moore.
Q Okay.
How about the second man that came out of the bank?
[50] A The second man that came out of the bank I saw as he entered the car. As to a description, other than height and weight, no.

Q Was he dressed in a particular way, if you recall?
A Yes.
They were in green fatigues. Both men were in green fatigues.
Q Could you describe the height and weight of the two people that you observed?
A The man I identified as Mr. Moore I described as five ten, one eighty, if I'm not correct. The other individual might have been slightly taller. I don't recall whether or not I could give a weight on it. The individual was getting into the car at the time.
Q Did you notice where these individuals got into the car?
A The third man got in the back seat.
Q And how about Mr. Moore?
A Mr. Moore got in the front seat alongside the driver.
MR. SIMS: That's all the questions I have, Judge.
MR. RABINOWITZ: Mr. Peterson, I'm going to put some questions to you and, unlike [51] a usual cross-examination, I'm just going to ask you what you saw, because your testimony is very important to my client, and I ask the jury to listen to your testimony very, very carefully.

CROSS-EXAMINATION

By Mr. Rabinowitz:

Q Now, sir, were you able to determine how many men were in the getaway car?
A Oh, absolutely.
Q How many were there, sir?
A Three.
Q All right.
Now, were you able to tell who the driver of the getaway car was in terms of a description?
How did you describe the driver—
A I saw—
Q —of the getaway car?
A —the driver initially as I came up to the car. I was no more than 60 feet away. I described the driver

at the time and will now as having long blond hair, a green sun visor and a white T-shirt on.
Q Now, the driver—the third man—was that third man that you described as having long blond hair, having a sun visor on—
[52] And what age did you state that man was, approximately?
A I stated he was about 30, I believe; somewhere in the area.
Q Now, was this the man?
A No. I don't believe this man drove the car.
Q All right.
Now, you have testified before in this bank-robbery situation, have you not?
A Yes. I've been in a previous trial.
Q That was the trial where Mr. Luck and Mr. Moore were on trial; isn't that true?
A Yes, sir.
Q All right.
Now, you have identified one of those men as being inside the bank and coming out, have you not?
A That's correct.
Q Which one was that?
A Mr. Moore.
Q Now, there was another man on trial then, was there not?
A Yes; there was.
Q What was his name?
A Mr. Luck.
Q Mr. Luck was on trial then, too.
[53] Now, Mr. Luck and Mr. Moore were on trial, and this was not the third man driving the car; is that correct?
A That man does not look like the man I saw driving the car.
Q Now, Mr. Luck and Mr. Moore, who were on trial before—did you identify either of them—
A Mr. Moore.
Q —did you identify either Mr. Moore or Mr. Luck—as being the driver of the getaway car?
A No; I did not.

Q Neither of them were a driver of the getaway car?
A I can't make that statement.
Q In other words, neither Mr. Luck or Mr. Moore drove the getaway car—
A I can't—
Q —that was—
A My statement would be to the effect that I saw the driver of the car and, in my opinion, I could not identify the driver, though I gave a description of the man driving the car.

I would not make the statement that neither man drove the car. I know that Mr. Moore didn't drive the car. Whether or not Mr. Luck drove the car, I couldn't so [54] testify.

Q Are you saying now that Mr. Luck, who you testified about before, fit the description—

Now, you saw Mr. Luck before in the former trial, didn't you?

He was sitting right in the courtroom?
A Oh, I had to see him.
Q All right.
A I couldn't miss him.
Q Now, what did—

What age was Mr. Luck, approximately?
A Forty, 45.
Q And how tall was Mr. Luck?
A Mr. Luck never stood in my presence. That would be very difficult for me to say.
Q Well, now, Mr. Luck, you say, was 40 or about?
A That's—
Q And the man who drove the getaway car you described as a young man, with blond hair, of about 27; correct?
A That's correct.
Q So, was Mr. Luck—as best you can observe, was Mr. Luck—the man who drove the getaway car or not?
A Would you rephrase that so I can hear that?
[55] Are you asking me to say Mr. Luck was or wasn't the man driving the getaway car?

Q I was not asking you to say anything, sir. I am asking you what you observed. I am asking you—

You saw Mr. Luck in the trial before; correct?
A If I could have identified Mr. Luck as driving the car, I would have done so at the other trial.
Q And did you identify Mr. Luck as the man who was driving the car or not?
A I did not.
Q Was he the man driving the getaway car?
A If I could have done so, I would have done so at the time.
Q I—
A I wouldn't have withheld any testimony.
Q I—

I am not saying that, sir. I am just saying: You saw the driver of the getaway car for—

THE COURT: Use the podium, Mr. Rabinowitz.

MR. RABINOWITZ: Excuse me, your Honor. I get—

THE COURT: All right, sir.

MR. RABINOWITZ: This is important, [56] and I get—

I get a little bit riled up.

This is important.

THE WITNESS: It is to me, too,—

MR. RABINOWITZ: Yes, sir.

THE WITNESS: —or I wouldn't be here.

MR. RABINOWITZ: I'm not finding fault with you. I want you to understand me. I know you are trying to tell us the best you know how, but I've got to get to what you know here.

By Mr. Rabinowitz:

Q You had a clear-cut view of the driver of the getaway car?
A That's correct.
Q And you have described the driver of the getaway car as being a man of about 27; correct?
A In that general area.
Q With long blond hair?
A That's correct.

Q And you have testified previously that Mr. Luck was not the driver of that getaway car?

A No. I didn't testify that he was or wasn't. I said I couldn't identify him.

Q Did you sit in the courtroom and look at [57] Mr. Luck?

A Yes; I did.

Q How long did you get a chance to look at him?

A Most of the time I was looking directly at the attorney who was asking the questions, and I didn't—

Just as now, I don't—

You know, I'm trying to direct my attention to you.

I saw the man, and if I had been able to identify him I would have said so at the time.

Q Well, in the former trial you did not identify Mr. Luck as being the driver of the getaway car?

A That is correct.

Q In fact, Mr. Luck you described as being about 40 years of age; you describe now as being—

A Just now.

Q Yes.

A Not in the other trial.

Q Yes.

A That's correct.

Q And the driver of the getaway car you described as being a much younger man with long blond hair?

A That was the description I gave.

Q Now, you did identify Mr. Moore as being one of the men who was in the bank?

[58] A That's correct.

Q Well, then, Mr. Luck and Mr. Moore had to have been the men who were in the bank if they weren't the man in the getaway car; isn't that true?

A Now you are asking—

THE COURT: That is a conclusion.

THE WITNESS: —me to—

THE COURT: Gentlemen,—

THE WITNESS: Yeah.

THE COURT: —that is not for him to say. That is for the jury to say.

That's an argument and a conclusion which one may draw if he desires to.

MR. RABINOWITZ: Thank you.

REDIRECT EXAMINATION

By Mr. Sims:

Q Mr. Peterson, for how long a period of time did you observe the driver of the car?

A Thirty seconds, 45 seconds, and then again maybe two, three minutes.

Q Okay.

During this time you were out behind the bank did you experience any apprehension of fear?

A Did I?

Q Yes.

[59] A Very definitely.

I sort of asked myself the question: "What in the world am I doing out here? I don't see anybody else volunteering."

But, yes, as Mr. Moore came out of the bank, I at that point decided to, whether it was fear or whether it was preservation or what, get back to some protection.

MR. SIMS: No further questions, your Honor.

THE COURT: Gentlemen, may he be excused?

MR. SIMS: He may, Judge.

MR. RABINOWITZ: Just one question.

THE COURT: All right, sir.

RECROSS-EXAMINATION

By Mr. Rabinowitz:

Q The man who drove the getaway car—did he have anything over his face?

A Absolutely nothing,—

Q You—

A —other than the green visor, which was on the hair, and I say "the hair" because I don't know whether it was his hair or somebody else's.

MR. RABINOWITZ: Move to strike as—
THE COURT: I think that's—
[60] MR. RABINOWITZ: Well, I got no point.

By Mr. Rabinowitz:

Q Did you get a chance to look carefully at the driver of the getaway car?
A The driver and I met eye to eye for a point of time.
There was—
Q And you have described him as a white male of about 27 with long blond hair?
A That is correct, with a visor and a T-shirt.
Q And you were—
You would not say that either Mr. Luck or Mr. Moore was that man?
MR. SIMS: Judge,—
THE WITNESS: I wouldn't make that statement.
MR. SIMS: —this question has been asked so many times by—
MR. RABINOWITZ: All right.
I'm just about through, Judge.
This is very important.
THE WITNESS: I cannot make that statement.

By Mr. Rabinowitz:

Q But you could make a statement that one of [61] the men that came out of the bank was who?
A Was Mr. Moore.
Q And did he have a mask on?
A Mr. Moore did not have a mask. He had a stocking on his head that was, as most women's stockings—leaves enough room to be seen through. You can judge either the face or the leg, depending on whether it's a leg or a face,—
Q But you would—
A —and his face stuck with me very vividly.
Q And, even with a stocking mask on his face, at the former trial you could identify—eyewitness identify—Mr. Moore as being one of the men in the bank?
A The instant I saw Mr. Moore, with his forehead, so on and so forth, it was impossible for me not to.

Q But you could not say that Mr. Luck was the driver of the getaway car?
THE COURT: Gentlemen, he's answered that—
MR. RABINOWITZ: All right.
THE COURT: —several times.
MR. RABINOWITZ: I just want to make it clear, and I won't go on.
THE COURT: All right, sir.

[62] FURTHER REDIRECT EXAMINATION

By Mr. Sims:

Q Mr. Peterson, this yellow hair of the driver of the getaway car—did you make any determination whether that was a wig or whether it was real hair?
A The gentleman driving the car had to turn around to face me and through the back window, with the sun against it, I would—
It's impossible for me to spot a wig. I couldn't tell who in here was wearing a wig, for example.
MR. SIMS: No further question, Judge.
THE COURT: Thank you very much.

FURTHER RECROSS-EXAMINATION

By Mr. Rabinowitz:

Q But you did—
THE COURT: You may be excused.
MR. RABINOWITZ: If your Honor please—
THE COURT: Yes, sir.

By Mr. Rabinowitz:

Q You have up to now always described it as long blond hair, haven't you?
A Oh, I wouldn't change my testimony.
Q Long blond hair?
[63] A That's correct.
MR. RABINOWITZ: All right.

* * * * *

[134] EDWARD BENJAMIN NICHOLS,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q State your name, please, sir.
A Edward Benjamin Nichols.
Q Mr. Nichols, do you know Billy Gale Henry?
A Yes; I do.
Q Do you see him here in the courtroom today?
A Yes, sir.
Q Where is he located?
A Sitting right there.
Q Okay.

MR. SIMS: Let the record reflect the witness has identified Mr. Henry.

THE COURT: The record will so show.

By Mr. Sims:

Q Where did you meet Mr. Henry?
A At the Norfolk City Jail.
Q Did you have an opportunity to have some conversations with Mr. Henry while he was in the jail?
A Yes, sir.
Q Did there come a time when you related the product of this conversation to an FBI agent?

[135] A Yes, sir.
Q Did you relate that to the FBI agent before or after Mr. Henry gave you information?
A After.
Q Did the FBI—
What is the FBI agent's name?
A Jerry Coughlin.
Q Did he have you ask specific questions of Mr. Henry?
A No, sir.

Q Did he tell you anything about the bank robbery at the Janaf Branch of the United Virginia Bank on the 28th of August 1972?
A No, sir.
Q Did Mr. Henry tell you anything about that bank robbery?
A Yes, sir.
Q Would you relate to the jury what he told you?
A That he had been in the bank; that he had been in the bank that he was accused of; that he had been in the bank several times; that he had exchanged money several times, and he—and one time, one particular time, that he tried—

THE REPORTER: Say it again, please.

[136] THE WITNESS: One particular time he tried and—

THE COURT: One time he—what?

The WITNESS: The bank had closed, and he tried, and he was refused admission to the bank because it was closed, and he turned and walked away.

THE COURT: Speak up just a little louder, too, if you will, please, so all the jury can hear you.

By Mr. Sims:

Q Did he tell you—

MR. RABINOWITZ: If your Honor please—
I'll wait for cross-examination.

THE COURT: All right.

MR. RABINOWITZ: I think up to now—

By Mr. Sims:

Q Did he—

MR. RABINOWITZ: I'll let it go on.

By Mr. Sims:

Q Did he give you any reason for going in the Janaf Bank?
A I believe he said he wanted to see who opened the vault.

[137] Q Okay.
Did he describe to you how a bank robbery occurred?

MR. RABINOWITZ: If your Honor please, he is leading his witness now.

MR. SIMS: Okay. I'll rephrase the question.

MR. RABINOWITZ: This is his witness, if your Honor please,—

THE COURT: Well,—

MR. RABINOWITZ: —and from jail—

THE COURT: —I suppose—

MR. RABINOWITZ: —he is asking him what he said, and now he's leading him into specific—

He's trying to get something from him. I don't know what it is. I've never—

The witness is a surprise to me.

THE COURT: All right. Suppose you try to rephrase it, although I don't believe that's leading, but he can rephrase the question.

Did he tell you anything about any bank robbery there?

THE WITNESS: Yes, sir.

[138] THE COURT: All right.

What did he tell you?

By Mr. Sims:

Q What did he tell you, sir?

A He said that people were—several people went into the bank, about showing guns, and a bank teller was hit.

Q Did he say anything about being removed from the bank?

A No. No; he didn't.

Q Did he mention anything to you about a rent receipt found—

A Yes, sir; he did.

Q Would you relate that, please?

A He said—he told me—that the only thing to connect him to the bank was a rent receipt of a house he had rented.

Q Have you previously been convicted of a felony?

A Yes.

MR. SIMS: That's all the questions I have.

CROSS-EXAMINATION

By Mr. Rabinowitz:

Q You are a convicted felon?

[139] A Yes.

Q And you were in jail with Mr. Henry?

A Yes.

Q And now you're free?

A Yes.

Q Now, what Mr. Henry related to you was that he was telling you about a rent receipt and telling you about the charges against him, was he not?

A He was.

Q Isn't that it?

A He mentioned the rent receipt and he said he was in the jail for bank robbery.

Q He was telling you basically about what charges were against him, wasn't he?

A He mentioned it.

Q And that's what it was all about?

A Yes, sir.

MR. RABINOWITZ: That's all I have.

THE COURT: All right, sir.

Gentlemen, may he be excused?

MR. SIMS: No further questions.

THE COURT: Fine. Thank you very much. You are excused.

MR. SIMS: At this time, Judge, I would like to call Joseph D. Sadler.

[140] JOSEPH DELBERT SADLER,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q State your name, please.

A Joseph Delbert Sadler.

Q Do you know Billy Gale Henry?
A Yes, sir.
Q Do you see him here today?
A Yes, sir.
Q Where is he?
A Right there.
MR. SIMS: Let the record reflect the witness has identified Billy Gale Henry.

By Mr. Sims:

Q Where did you meet him?
A Norfolk City Jail.
Q Did he relate any information to you?
A Yes, sir.
Q Did you subsequently give that information to an FBI agent?
A Yes, sir.
Q Who was the agent?
A Agent O'Hara.
[141] Q Did you have any conversations with Mr. O'Hara before Mr. Henry told you anything?
A No, sir.
Q Did Mr. O'Hara ask you to ask Henry any specific questions about this information?
A No, sir.
Q Did Mr. O'Hara arrange for you to be placed near Mr. Henry?
A No, sir.
Q Okay.
Did Mr. Henry give you any information concerning a bank robbery?
A Yes, sir.
Q What was that?
A He give me some information concerning a bank robbery in Virginia Beach approximately around six months ago.
Q In what month?
A I don't remember the month, but around six months ago.
Q Okay.
That would be—

MR. RABINOWITZ: If your Honor please, we can tell what six months is.
MR. SIMS: Okay.
[142] THE COURT: All right, sir.

By Mr. Sims:

Q Did he name the bank?
A No, sir; he didn't.
Q What did he tell you about the bank robbery?
A Well, Mr. Henry had—
I was in the cell block. The marshals had brought me to the cell block, which I was in federal custody before then, and I went to 7-A and was in the cell by myself, and after Mr. Henry learned that I had just come from the federal institution he moved down to the cell block with me, and then he started talking to me about various things that had happened, feeling what type of guy I was, and he made reference that him and a fellow by the name of Lucky or Luck or something of that sort and another man, which name he didn't call, went to a bank, and a woman driver in a car. Him and another man went inside the bank, and another man stood outside the door, and the woman was in the car—in the getaway. As he went in, he made—I believe he said that he had to hit one of the officials in the bank and took some money.
Q "He" meaning Henry?
A Yes, sir.
And then later on he asked me what was I charged with, and I told him and that I expected to get out [143] on probation, and he said that he wore a mask—him and the other fellows.
Q Okay.
Have you been convicted of a felony, sir?
A Yes, sir.
MR. SIMS: No further questions.

CROSS-EXAMINATION

By Mr. Rabinowitz:

Q Mr. Sadler, you have been charged and convicted of a felony?
A Yes, sir.

Q And now you have been let go?
A I beg your pardon, sir.
Q And now you have been let loose on the streets?
A No, sir.
Q Are you still in custody?
A Yes, sir.
Q Have you been promised any help by your testimony here today?
A No, sir.
Q How did you contact the FBI with this testimony?
A How did I contact the FBI?
I called the FBI agents.
[144] Q You did this—
A Yes, sir.
Q —as your public-spirited duty?
A In relation to my case.
It was through the advice of my attorney.
Q It was through the advice of your attorney?
A Yes, sir.
Q Who is your attorney?
A Mr. Abraham.
Q Now, you tell us that Mr. Henry told you four people were involved in a bank robbery?
A He said four; yes, sir.
Q And he said a woman was involved?
A Yes, sir.
Q Did he say what color the hair of the woman was?
A No, sir.
Q When did this supposed conversation with Mr. Henry occur?
A In November and the last part—the first part of December.
Q Well, which was it?
A I said last—
I was with—placed with Mr. Henry from the 24th of November 1972 until the day he left before Christmas.
[145] It was about a week before Christmas.
Q And he talked about this incident all that time?
A On several occasions.
Q What exactly again did he tell you about this incident?

A Well, after he gained my confidence and he found out I had been in federal custody myself and done time, he figured he could trust me and, with the hopes that I was getting out on probation, the probability that I might be able to help him.
Q Now, how in the world were you, a convicted felon, going to help him?
A Well, there's other circumstances.
Q Like what?
A Well, he was under the impression, and which I was under the impression, that I would get out on probation,—
Q You didn't—
A —and I was to contact—
Q What were you supposed to do for him when you got out on probation?
A I was supposed to contact a man by the name of Garland Holloway.
Q Who is he?
[146] A A friend of his, who he told me that was the only one that could give any evidence against him that he had robbed this bank.
Q Where was this Holloway supposed to be?
A In Atlanta, Georgia.
Q And were you supposed to go see Holloway?
A I was supposed to go see him and talk with him.
Q And what was Holloway supposed to have had to do with this robbery?
A I think he was staying with Mr. Holloway at the time.
Q He was staying with Mr. Holloway at the time of the robbery?
A Yes, sir.
Q In Atlanta, Georgia?
A Not in Atlanta, Georgia. Mr. Holloway was here in Norfolk, Virginia, in Ocean View.
Q Well, has Mr. Holloway been apprehended?
A I don't know, sir.
Q Well, did you intend to do this?
A I beg your pardon, sir.

Q Did you promise Mr. Henry that you were going to contact some Garland Holloway in Atlanta, Georgia?

A No, sir.

[147] Q You never promised him anything?

A No, sir.

Q Well, I thought you told us that he's telling you all this because you promised him some help when you got out on probation.

A He would assume that I would help him. I told him I would give it some thought. I did not promise him anything.

Q You told him you'd give it thought?

A Yes, sir.

Q You never promised him anything?

A No definite promise was made.

Q Did you take down the name "Holloway"?

A No, sir.

He supplied the name to me of Garland Holloway through the mail. From Portsmouth Jail, he wrote to me to Norfolk Jail.

Q I thought this happened when you were with him.

A He supplied only one name to me. He supplied—The one name in Norfolk Jail was Lucky.

He sent me a letter from Portsmouth Jail to Norfolk Jail, asking me when I got out on probation to come over, that he wanted me to go and see Mr. Holloway.

[148] Q And it was only after this Mr. Holloway was mentioned that he told you anything, wasn't it?

A No. He told me this before. He said he would let me know the name of the person that he wanted me to contact just as soon as I got out.

Q And you intended to do this?

A I hadn't made any promises at all.

Q Mr. Sadler, have you been made any promises at all?

A Have I been made any promise by whom?

Q By anybody.

A No one.

Q Never in your life?

A No, sir.

Q And you're still in custody?

A I'm still in custody.

Q Where are you residing now?

A In Norfolk City Jail.

Q How long have you been in the Norfolk City Jail?

A Since November the 24th.

Q When is your trial?

A I've completed my trial.

Q Is that the first time you have been in Norfolk City Jail?

[149] A I was in Norfolk City Jail November the 24th; yes, sir.

Q I said: Is this the first occasion upon which you have been residing in the Norfolk City Jail?

MR. SIMS: Your Honor, I'll object to that question. I don't think it's relevant.

The COURT: Well, I don't know. It may—

I'll permit him to ask it.

MR. RABINOWITZ: Thank you.

THE WITNESS: In 1961.

MR. RABINOWITZ: Sir?

THE WITNESS: Nineteen sixty-one.

By Mr. Rabinowitz:

Q Nineteen sixty-one?

A Yes, sir.

Q How long did you reside that time in the Norfolk City Jail?

A Approximately 30 days.

Q Then where were you sent?

Where were you sent?

A Lewisburg Federal Prison.

MR. RABINOWITZ: All right. That's all I have of this witness.

THE COURT: All right.

* * * * *

[154] STEVEN D. SLAYTON,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q State your name and occupation, please, sir.
A Steven D. Slayton, and I'm Controller and Office Manager for Electra Company.
Q Where is the Electra Company?
A Cumberland, Indiana.
Q What does your company do?
A We manufacture and market scanners, radio receivers. Bearcat is the trade name.
Q I show you what's been marked as Government's Exhibit Number 10; ask you if you can identify this item, please, sir.
A Yes.
That's one of our—
It also has a mobile hookup to it also.
Q Is that the item that your company—
A Yes.
Q —markets?
A Yes; that's it.
Q How many channels on this thing?
A Eight.
[155] Q And would you explain just generally to the jury how one of these things operates?
A Well, depending on what area you live in, you buy the frequencies that go with this. It'll have a continuous scan, and when it hits one of these frequencies that have a transmission on it'll lock in on it, and as soon as they go off it goes back scanning. So, it's always looking for transmission.
Q Now, how many frequencies is this thing capable of scanning—
A Just eight.
Q —at one time?
A (No response.)
Q Eight?
A (The witness nodded affirmatively.)
Q Now, what is the situation with the crystals?

Each crystal is assigned a frequency; is that correct?
A True. Yeah.
Q And if I wanted to pick up any given broadcast in a given area what would I have to do?
A Well, if you could get the information from that area on what frequencies they were, you could order the crystals either through us or through a distributor, or if you wanted to call us you could probably call us and we would [156] give you what you were looking for in that area if you—it's depending on what you wanted.
Q I show you what's been marked for identification purposes as Government's Exhibit Number 24, and take it out of that plastic case and examine it and see if you can identify it, sir.
A Well, identifying marks are "Received July 5th, 1972, Electra Corporation". It also has my stamp down here where it mentions a money order for $55 to cover the—what we call purchase order, and it's for 11 crystals.
Q What is it?
What sort of form is it in?
A Well, it's
Q Would you just read it, please?
A Okay.
It says:
"Please send me the following crystals for a Electra Bearcat"—in quotations—"scanning receiver."
Then it's got "VHF", and under that it has six crystals, and it has—it goes down—"UHF", and under that it has five crystals, and it's got "1" marked across from each one, five dollars on the other side, and total of $55.
It has:

[157] "Mail To:

"R. A. Norris, Apartment Number 2
"Rivera Garden Apartments
"3000 BuFord Highway, Northeast
"Atlanta, Georgia."
Q All right.
Now, do you maintain records on—
Was that order filled?
A Yes; it was.

Q Do you maintain records on what police facilities are using what frequencies?

A Yes.

We have a microfilm that we get once a month, indicating any new stations and also old frequencies rather —instead of stations.

Q Did you have an opportunity to compare the frequencies requested in that letter with assigned frequencies in the southeastern section of the United States?

A Yes.

We—

Q What was the result of that comparison, sir?

A Well, most of the—

Well, I would say all the crystals are—indicate Atlanta, Georgia area, and because these are common [158] type crystals they also have some relation to, say, like Norfolk area or Virginia Beach. Some of them will correspond to Virginia Beach.

Q Well, when you say "Virginia Beach", is there any particular agency in Virginia Beach?

A Well, it would be—

I don't know, looking at these, what it would be. It would be probably Police Department or mobile relay or State Police Control Center.

Q Now, was there anything unusual that caught your attention about the number of frequencies ordered?

A Well, at the time—

By this being an eight-channel scanner, there's 11 crystals, which is not really that unusual. Some people have two of these items. Some people just like to—if they travel or something like this, they make take the crystals they know that would be in that area, if they want to particularly listen to it.

Q Was the frequency 156.21 requested?

A Yes; it was.

Q Okay.

What did you do with this letter subsequently?

A Well, as soon as the order was filled it was attached to the information we keep.

[159] An FBI agent came in to find some information about—

A phone call was placed to our company from Atlanta, Georgia.

Q Did you give him that letter at the time?

A Well, at the time we were looking at it for maybe a relation—relationship. In other words, we thought maybe there might be somebody working there as friends or relatives, and after they left then we looked through our files, and we had, oh, I think, about five or six names, one of 'em being R. A. Norris, and, so, I called him back, and he requested the information. So, I sent it to him.

Q You sent that letter—

A Yes.

Q —to the FBI?

A (The witness nodded affirmatively.)

MR. SIMS: Thank you.

* * * *

[167] CLARENCE E. PHILLIPS

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q State your name, please, sir.

A Clarence E. Phillips.

Q How are you employed, Mr. Phillips?

A I'm employed with the Federal Bureau of Investigation as a fingerprint examiner.

Q Where are your official headquarters?

A My official headquarters are in Washington, D.C.

Q And what is your official title, sir?

A Fingerprint examiner.

* * * *

[169] Q At this time I show you what's been marked as Government's Exhibits 14 and 15, which are a rent receipt and a lease agreement that were found on the back seat of a getaway car, and ask you if you have ever seen this evidence before, sir.

A Yes; I have.

Q Where did you see it?
A In my office in Washington, D.C.
Q Did you have an opportunity to examine it?
A I did.
Q What was the result of your examination?
A I developed two latent palm prints on this copy of the lease.
Q I now hand you Government's Exhibit Number 21, the known fingerprints of Billy Gale Henry; ask you if you have ever seen those.
A Yes.
Q Where have you seen those?
A Also in my office in Washington, D.C.
[170] Q Did you have an opportunity to compare the latent prints developed on the lease with those inked prints of Billy Gale Henry?
A Yes.
Q What was the result of your comparison, sir?
A The two latent palm prints developed on the lease were made by the same palm as made the right palm print appearing on this card, which has been designated Government's Exhibit Number 21.
Q Therefore, your testimony is that Billy Gale Henry's palm print is on that rent receipt?
A That is correct.

* * * *

[177] ELDON BRYANT,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q State your name and occupation, please, sir.
A Eldon Bryant, special agent with the Federal Bureau of Investigation.
Q How long have you been a special agent?
A Since November 1970.
Q Where are you currently assigned?

A I am currently assigned to the FBI Laboratory as an examiner from Washington, D.C.
Q What is the nature of your work, sir?
A I design, engineer and supervise installations of FM radio systems and work with material of an evidentiary nature that require knowledge in radio or electrical matters.

* * * *

[178] Q Mr. Bryant, I hand you what has been marked and identified as Government's Exhibit Number 10; ask you if you have ever examined that piece of evidence.
A Yes. That looks like the one I have examined.
The one I did examine I marked on the inside left rail with my initials and the date.
I'll have to take it apart to check.
MR. RABINOWITZ: If—
THE WITNESS: It's a matter of taking—
THE COURT: All right.
MR. RABINOWITZ: If Mr. Sims is confident that this is the one, I'm confident it is the one, Judge.
I wouldn't keep the jury here while he tears it apart.
If you—
Are you confident—
[179] MR. SIMS: I can assure you it is the one.
MR. RABINOWITZ: That's good enough for defense counsel.
MR. SIMS: No doubt about it.

By Mr. Sims:

Q What test did you perform on that?
A Well, when I received it at the laboratory, it had a 12-volt battery setting on top of it with a strap and the wires in the back connected to it. I turned it on to see if it would work.
Q Did it?
A Yes; it did.
Q Did you have an opportunity to examine the crystals?
A Yes; I did.
Q What was the result of that examination?
A There were five crystals placed inside in Channels 1 through 5, and the first three crystals were on the

Norfolk, Virginia Police Department, and the third crystal was on the Virginia Beach Police Department, or fourth crystal, and the fifth crystal was on a Humble Communications Company.

Q Were you able to determine the number of the third crystal—the frequency?

[180] A Yes.

I have that in my notes.

Q Would you refer to that, please?

A It's 156.21 megahertz.

Q Thank you.

Does anyone else in this area use these frequencies?

A The only ones authorized to use the frequencies are the ones stated prior—the Virginia Beach Police, Norfolk Police and Humble Communications.

* * * *

[182] GAYNOR HOLIDAY,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q State your name and occupation, please, sir.

A Gaynor Holiday, Assistant Vice-President and Rental Agent for Delaware Valley Financial Corporation.

Q In that capacity do you have an opportunity to manage a residence at 6420 Wailes Avenue?

A Yes, sir.

Q Where is that located, sir?

A In Norfolk, off of Virginia Beach Boulevard.

Q Did you have an opportunity to rent that house on the 23rd day of August 1972?

A Yes, sir.

Q Do you recall the name of the person you rented it to?

A Yes.

Mr. Allen Norris.

Q Do you see Mr. Norris in the courtroom today?

A Yes, sir.

Q Would you point him out, please?

A The defendant.

MR. SIMS: Let the record indicate the [183] witness has pointed out Billy Gale Henry.

His name is not Allen R. Norris but is Billy Gale Henry. So, I'll refer to him as Mr. Henry.

THE WITNESS: Yes, sir.

By Mr. Sims:

Q I show you Government's Exhibits 14 and 15; ask you to inspect those and tell me whether you have ever seen either one of them before.

A Yes, sir.

Q Where have you seen them?

A At the house on Wailes Avenue when I met Mr. Henry.

Q Who prepared those documents?

A I did, sir.

Q Now, was there another opportunity for Mr. Henry to sign his name on either document?

Do you recall?

A He signed the lease only, sir.

Q In his—

A It isn't on this copy, sir.

That is his copy.

I have a photostatic copy of the original that he did sign.

Q In other words, the copy you have there is—

[184] A Would be the tenant's copy, and it's not necessary that they sign it.

Q Right.

Was that prepared contemporaneously with the original?

A Yes, sir.

Q Okay.

And you gave this copy that we've marked as Government's Exhibit 15 to Mr. Henry?

A Yes, sir.

Q Okay.
Now, may I see the original?
A This is a photostatic copy, sir.
The FBI Office in Newport News picked up the original.
Q All right.
Did you observe Mr. Henry sign his signature on the original lease?
A Yes, sir.
Q Okay.
What do you recall the rent of the house?
A One sixty per month, with a hundred dollars' security deposit.
Q Did Mr. Henry pay you that?
A Yes, sir.

* * * *

[190] Barbara Henson.

BARBARA LORRAINE HENSON,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q State your name, please.
A Barbara Lorraine Henson.
Q Mrs. Henson, you live on Wailes Avenue; is that not correct?
A Yes, sir.
Q Where is your house in relation to 6420 Wailes Avenue?
A Right straight across the street.
Q Okay.
Do you recall the events around the 23rd of August 1972 surrounding 6420 Wailes Avenue?
A Yes, sir.
Q Would you tell the jury what you saw as far as that house is concerned?
A Well, on Wednesday morning about seven thirty there was two men that was looking—coming out of the

little white door from the house, and they come up to their car, and they got in and they left, backed out of the driveway and left, and about one o'clock one of them come [191] back to rent the house, and they stayed there about 30 minutes, when the real estate man come, and they went in the house, and the real estate man and the man walked out, and they had a little bit of trouble opening the door. So, the man that rented the house was trying to learn the lock, how to open it, and they got off the porch, and the man got in the car and the real estate man got in his and they left, and then on Thursday at 11 o'clock the two men returned with some gold drapes. They hung 'em up at the window and one in the bathroom, and they left about eleven fifteen.
Q Now, of the two men that you described, do you see one of them today—
A Yes.
Q —in the courtroom?
A Yes, sir.
Q Where?
A There.
MR. SIMS: Let the record reflect the witness has identified Billy Gale Henry.

By Mr. Sims:

Q Now, Mr. Henry came to the house, I think you stated, once with another man and then once he came alone?
A Yes, sir.
Q Do you think you'd be able to recognize the other man that he came with?
[192] A Yes, sir.
Q I hand you now photographs of some individuals,—I think it's seven individuals—and I believe, Mrs. Henson, that you were shown those photographs once previously by an FBI agent—
A Yes, sir.
Q —and you picked out the man that appeared at the residence with Mr. Henry?
A Yes, sir.

Q Would you review those and see if you can once again pick out that man?

Have you picked the man out?

Okay. Thank you.

MR. SIMS: I think I'll admit Government's Exhibit Number 27 at this time, which is the photograph she picked out, Judge.

THE COURT: All right, sir.

* * * *

[196] NICHOLAS V. O'HARA,

a witness recalled by and in behalf of the government, having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q Agent O'Hara, I hand you what has been admitted as Government's Exhibit Number 27; ask you if you can identify that, please.

A This is a photograph of John Oscar Luck.

Q Is he the fellow that you arrested at Wailes Avenue on the 28th of August right after the bank robbery?

A He was the second man that came out of the house August 28th after that robbery.

MR. SIMS: Thank you.

No further questions.

CROSS-EXAMINATION

By Mr. Rabinowitz:

Q Mr. O'Hara, you also arrested Mr. Luck at that time and Mr. Moore?

A Yes.

Q On the 28th of August?

A Yes.

Q At Wailes Avenue?

A Yes.

* * * *

[244] The jury returned to the courtroom at 6:18 p.m. and the following proceedings occurred in the presence and hearing of the jury:

THE DEPUTY CLERK: Members of the jury, have [245] you agreed upon a verdict?

THE FOREMAN: We have, yes.

THE DEPUTY CLERK: May I have it, please?

The defendant will please stand.

Members of the jury, hearken unto your verdict in Criminal Action Number 243-72-N—the United States versus Billy Gale Henry:

"We, the jury, find the defendant guilty as charged and of assaulting or putting in jeopardy the life of Robert Woodcock in the commission of such offense as charged in the indictment."

Signed "Robert A. Combs", Foreman.

Dated March the 7th, 1973.

Members of the jury, is this your verdict, so say you all?

(The jurors nodded and indicated in the affirmative.)

* * * *

[247] [THE COURT]: I will deny the motion for a new trial; direct that judgment be entered on the verdict returned by the jury.

All right, gentlemen. Are you all ready to proceed to dispose of the matter now?

MR. RABINOWITZ: If your Honor please, we waive the report.

THE COURT: All right, sir.

[248] All right, sir. I'll be glad to hear anything you have to say on behalf of the defendant; any evidence you wish to present concerning the disposition of the matter.

MR. RABINOWITZ: I would ask the Court to use its best discretion in the matter of sentencing, and I'm fully cognizant that the Court will consider the rights of the defendant in sentencing.

THE COURT: Thank you, sir.

The government have any comments?

MR. SIMS: No, sir.

THE COURT: All right, sir.

Let the defendant come forward.

THE DEPUTY MARSHAL: Come forward.

THE COURT: Stand right at the podium. It'll be easier for you.

Billy Gale Henry, you have heard the comments of your counsel. You have heard the evidence presented in this case. Is there anything that you would like to say now before the Court passes sentence upon you?

THE DEFENDANT: Well, I'd just like to say I'm a victim of a long chain of circumstances, and I still contend that I'm not the man that actively went to that bank and robbed those people of the funds, that I stand before you a fool rather than—than a provoked incident of violence, and [249] I have nothing more to say; just that.

THE COURT: Criminal Action 243-72-N—the United States against Billy Gale Henry: It is the judgment of the Court that the defendant be committed to the custody of the Attorney General, to be by him or his duly authorized representative confined in such institution as he may direct for a term of 25 years unless sooner released by operation of law.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK, VIRGINIA

Civil No. 75-453-N

BILLY GALE HENRY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF HABEAS CORPUS 2255

Comes now Billy Gale Henry, Petitioner, and moves this court to issue a writ of Habeas Corpus vacating the sentence and setting aside the conviction of Criminal case No. 243-72-N, Eastern District of Virginia, U.S. District Court in Norfolk, Va.

JURISDICTION

Jurisdiction is pursuant to 28 U.S.C. 2255, and the Trial Court of this case.

PETITIONER

Billy Gale Henry, Petitioner, is an inmate of the USP at Leavenworth, Kansas—on conviction of 243-72-N, Denied on appeal to the U.S. District Court, and in the 4th Cir. AC 1413-73, and denied Certiorari S/C 74-5560. Petitioner was sentenced by the Honorable Judge Kellan to 25 years in custody of the U.S. Attorney General.

RESPONDENT

The United States of America, the U.S. Attorney General, and Norfolk's U.S. Attorney.

STATEMENT OF THE FACTS

The criminal complaint charged the Petitioner with having rented a house used as a "hide out" where two robbery suspects of a bank robbery (August 28th, 1972, United Bank of Virginia) were arrested and later convicted. (Luck and Moore.) The bank was located in the 600 block of North Military Highway—the same city block as the Main Office of the FBI—which is thoughtful. . .

Luck and Moore were apprehended the day of the robbery—Henry, Petitioner was never identified as having been in Norfolk or even in the State of Virginia on or about the day of the Bank Robbery. No knowledge, intent, or willingness was ever proved. Circumstantial evidence was used to prove the petitioner was a principle of the crime.

"Live fingerprints" were found in the teller's cage, of which element Petitioner is accused of performing—this "Direct Evidence" was ignored and/or overlooked, as the prints were not Petitioner's prints. (FBI Lab. Report.)

The only eye-witness to the bank robbery who could positively identify any of the participants, a Mr. Peterson, testified that the driver of the Getaway car had long Blond hair and was about 27 to 30 years of age. Mr. Peterson stated unequivocably that Petitioner was not the driver of the Getaway car.

To reiterate, what is the inescapable conclusion: the previously convicted Luck and Moore were the two bank robbers in the bank, the Petitioner was not the driver of the car, as stated by the eye-witness Mr. Peterson. Mr. Peterson identified Moore coming out of the bank, and said Luck was not the driver of the car. Luck and Moore having been arrested together with the fruits of the crime, seemingly they were the two robbers who went in the bank . . . and the 27 to 30 year old person with the long blond hair evaded capture. Petitioner is 48 years old, Brown Hair.

To prove Petitioner guilty, the Government used "hearsay testimony" from two ex-cellmates of the Petitioner . . . after having concealed them, failed to disclose, suppressed material evidence, used deception on the Court, violated the Court's discovery order, presented perjured testimony against Petitioner—all of which denied the Petitioner a fair trial and due process of law.

DENIAL OF DUE PROCESS OF LAW—PERJURED TESTIMONY OF MATERIAL VALUE PREJUDICED PETITIONER

1. Perjured Testimony—Government's witness Sadler "*Planned Pejury revealed.*"
2. Government's witness Nichols was a paid informer who violated "*MASSIAH RULE.*"
3. FBI and U.S. Att. used *deception* on the *Court, Defendant* and the *Jury.*
4. Violation of the Court's *Discovery Order*—Denial of *Due Process* and *Fair Trial.*
5. U.S. Attorney's Argument to Jury was *prejudice* to *Petitioner; Un-Fair Trial.*
6. Non-disclosure of Exculpatory Material Evidence—Favorable to Petitioner.
7. Incompetence of Petitioner to assist Counsel and/or ineffective counsel.

Due Process of Law and a Fair Trial is the issue petitioned to the court. An ulterior motive by the FBI should not be ignored—the deception and/or denial of due process of law and a fair trial lies in responsibility on the FBI and the Asst. U.S. Attorney who presented it to the Court: A foul blow to the Defendant and the Jury. Willingly and with knowing intent to try this Petitioner in an atmosphere of fundamental unfairness.

PERJURED TESTIMONY—GOVERNMENT'S WITNESS SADLER—"PLANNED PERJURY REVEALED"

The Government used hearsay testimony from an ex-cellmate, Joseph D. Sadler, who called the FBI "in rela-

tion to his case." Not as his public spirited Duty. Before Sadler called the FBI he discussed the conspiracy with one of his friends in the jail cell, other than the Petitioner. This sworn statement was taken after the Petitioner's trial. This affidavit is on file in the FOURTH CIRCUIT COURT OF APPEALS, C/A 1413, (1973) Billy Gale Henry. . . . .

Subscribed and sworn to by Joseph Ray Conway. . . .

> "I met Mr. Sadler at the Norfolk City Jail, and got very close as a friend. We were in the same cell as Bill (Billy Gale Henry), and we talked together quite a lot. One night, Mr. Sadler told me he couldn't stand going back to prison. I asked him how he could keep from going, he told me that he would tell the FBI that Henry robbed the United Virginia Bank of Janaf Shopping Center. I said, 'but Billy has never admitted robbing no kind of bank.' Sadler said, 'I know, he never admitted it, but I'll tell this to the FBI and they'll keep me from going to prison.' I said, 'That is a hell of a way to keep from going back,' and he said, 'I have a lot to look forward to on the street, and I will do anything to get back out there.' "

Conway was contacted after the Henry trial which was March 7, 1975, and the Affidavit was signed and sworn to April 13, 1973.

At the trial Sadler attempted to testify to a certain Henry conversations allegedly implicating himself in the bank robbery. On cross-examination Sadler didn't know "What city the bank was in (He said Virginia Beach, Virginia, Not so.) (Tr. 141) Sadler didn't know how many robbers were involved, or how the robbery was carried out, in confusion told a "fairy tale" about a woman driving the car, and a robber standing on the sidewalk outside the bank. A description of a robbery which didn't fit into the facts of the case, as a private citizen had witnesses the robbery from only a few feet and described only three men involved—and this witness who did not have an ulterior motive to fabricate said Henry didn't look like anyone he could identify.

When Sadler was asked if he was made promises for his testimony, TR. 143. "No sir"

Def. Att. "How did you contact the FBI with this testimony?"

Sadler "How did I contact the FBI? I called the FBI Agents."

Def. Att. "You did this—"

Sadler "Yes Sir."

Def. Att. "As your public-spirited duty?"

Sadler "In relation to my case.

At the advice of my attorney."

Sadler was a Commonwealth of Virginia prisoner—who did not face any Federal charges—calling the FBI, "In relation to his case" after having made the statement to Joseph Ray Conway tend to explain the nature of the relationship between Sadler and the FBI.

When Sadler called the FBI, which was about December 12, 1972, Joseph Ray Conway was mysteriously transferred to the State Farm, Conway was not a Federal prisoner, although his trial process was not complete. This was a first payment from the FBI for the expected testimony from Sadler—Henry was transferred also, to a different jail. The FBI did this to avoid Henry becoming aware of the informers who were to testify—in the case of Sadler, Purjure himself at the Henry Trial.

On December 27, 1972 at the Motion for Discovery the Government failed to disclose these statements of Henry, and instead, used this perjured testimony as a surprise to the Defense.

Deception was used on the Court, Defendant, and the Jury. The Court had ordered the discovery of; "Statements of the Accused" referred and made clear in several different ways, to use this perjured testimony was denial of due process of law, and denial of a fair trial.

Planned perjury—this was not incidental—this perjury was planned and executed by deception by a person with evil intent and an ulterior motive. *Napue* v. *Illinois*, 360 U.S. 264,

"the same result obtains when the state though not soliciting false evidence, allows it to go uncorrected when it appears."

Giglio v. *United States*, 405 U.S. 150 (1972)

C. J. Burger "A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . .' Napue, supra, at 271."

Moore v. *Illinois*, 408, U.S. 798, at 2569. . . Quoting Napue,

"This court held that the failure of the prosecutor to correct the testimony, which he knew to be false, denied Napue due process of law, and this was so even though the false testimony went only to the credibility of the witness."

Sadler was the only evidence showing Henry at the scene of the crime. Perjured, hearsay testimony, from a felon who intended to and did bargain with FBI.

GOVERNMENT'S WITNESS NICHOLS WAS A PAID INFORMER WHO VIOLATED MASSIAH RULE

II

MASSIAH RULE, which is to say that the Police or FBI and/or the Government cannot send a paid informer or agent of the FBI to learn more information and facts of the case for investigative purposes—because the alleged violator of the law has a right to representation of counsel while being interrogated.

Nichols, one of the informers at the trial of Henry, called the FBI and was released from jail. The Agent he called was an agent he had worked for and with in the past, Special Agent Jerry Coughlin. At this time Agent Coughlin sent Nichols back to the Norfolk City Jail to visit the other informer Sadler who had not made contact at this time. On this same day, about December 3rd or 4th, 1973—Nichols called Henry out on a visit. Nichols is a black man and Henry a white-man.

When Henry was transferred to the Portsmouth City Jail—Nichols came to see Henry there on at least two occasions. Nichols was not an approved visitor, as to visit requires a special kinship or business. The FBI and/or the Sheriff gave Nichols special permission to visit. (see [can't copy—but have sworn statement from sheriff]

The visits were not conducted in the usual manner—which is at a window on each floor. Instead, Henry was called to visit the informer downstairs in a specially built room next to the Sheriff's Office—evidently so the visits can be monitored and/or taped.

Henry did not give his permission, and in fact, asked the informer not to return on a visit. On one occasion Henry refused to visit because he didn't know who the visitor was, and in fright of being interrogated by the black man refused to come out for the visit, and/or told them that they were after the wrong Henry.

Edward B. Nichols was a paid informer for the FBI prior to the Henry case investigation, received pay and rewards for his investigation work in the Henry case, and has worked for the FBI since that time. This is violation of the standards and guide-lines set-out by the U.S. Supreme Court in the *Massiah* case. Denying the "Post Indictment Billy Gale Henry" of his right to counsel while being interrogated by an "agent-informer" of the FBI as part of their investigation of his case. Denial of Constitutional Rights—of *due process* and a *fair trial.* Henry had aggressively dismissed the FBI agents as they attempted to question him, informer E. B. Nichols was used to engage Henry in conversation for the FBI and their investigation. Violation of Due process and a fair trial.

FBI AND THE U.S. ATT. USED DECEPTION ON THE COURT, DEFENDANT AND THE JURY

III

The evidence against the Defendant was a thin web of inconclusive circumstantial evidence with no direct evidence of guilt. There was no witness showing Henry in Virginia on the 28th of August. When Agent-in-charge

of the case, Mr. O'Hara was asked if he had any witness placing Henry with Luck or Moore on the 28th, he said, "No."

This was the basic need of an informer to give even the slightest piece of evidence that Henry was in Virginia on that date. Asst U.S. Attorney Sims, was reprimanded in Judge Hoffman's courtroom during a hearing in the last part of November or early December 1972, for conferring in whispers. The Honorable Judge stated flatly that the FBI was not running the show.

The transferring of Henry and Conway away from the informer Sadler, was a move to hide the existence from Henry and the Court. Even when they agreed to supply statements of the accused, during the Discovery Hearing 12/27/72 they defied the court's discovery order and did not disclose.

The FBI is a professional investigative agency—from their interviews with Sadler they would have known, or should have known, that it was a fabricated "Fairy tale." It is strong possibility, without proof, that they actually planned to have Henry, Sadler and the other informer Nichols placed in the same housing.

When Henry was committed to the Norfolk City Jail, the jailer made the statement that we have a special place for you, a series of changes in cell and housing arrangements envolving all three moving within the first few days in the jail. All three were in different places, and all three ended in the same small tank—which was not crowded, and the rest of the jail was crowded to overcrowded.

The informers were kept a tightly guarded secret—two days before the trial Asst. U.S. Att. Sims filed a habeas Corpus testimony writ . . . knowing the odds were a million to one that the Defense attorney would not see this on the Docket. He called this notification that Sadler would testify. Nothing was filed about Nichols.

Planned—Planned deception of the Court, Defendant, and the Jury. Denial of Due Process of Law and a fair trial. The denial is not a reflection on the Court and Your Honor—the FBI and the Asst. U.S. Attorney planned it.

NON-DISCLOSURE, VIOLATION OF COURT'S DISCOVERY ORDER, DENIAL OF DUE PROCESS

IV

Boxed-in is from the written Motion of Discovery, TR.D. is answers to it.

Page #2, No. 6

6. Any statements, documents of any nature and at any time made and/or signed or executed by the defendant in regard to or in relation to these proceedings, if any there be, and any statements made and/or given by the defendant made orally and thereafter reduced to writing, if any there be, in regard to or in relation to these proceedings.

Mr. Sims; "The statements of the Defendant—We'll furnish those. I think they're entitled to those."

page #3, No. 16 . . .

16. A copy of the conviction records, if any, of any of the prosecution witnesses.

Mr. Sims; "Number 16: We'll furnish him the FBI rap sheet that we have in our possession.
Def. Att. "You will furnish 16?"
Mr. Sims: "Yes."

page #4, No. 24 . . .

24. All statements, or conversations, or writings of the accused, or of third persons overhearing the accused, who might testify to statements or conversations of the accused.

Mr. Sims: "We'll furnish statements of the accused, if any."

In these agreements, there was total understanding—both attorneys and the Court were looking at their copy of the written Motion. The Government agreeing to furnish the statements in two places in one Hearing—specifying oral, over-heard, conversations repeated of which someone who might testify.

Failure to do this was violation of the Court's Discovery order. Not to furnish is to say, "*No statements exist.*" As the Defense was not furnished any statements, the Defense took the lack of response as a declaration that no such evidence existed. This is Deception of the Defendant—denial of due process and a fair trial.

Possession of these statements and information was in the Government's hands, or file at the time of this hearing. It was the Government's responsibility to come forward for discussion of whether they should or shouldn't disclose. Silence was and is a statement of un-truth. A Supreme Court Justice said, "the cruelest lies are often told in silence."

A new trial is required. *Brady* v. *Maryland*, 373 U.S. 220, *Barbee* v. *Maryland*, 331 F.2d 842 and many other cases. . . . .

ASST. U.S. ATTORNEY'S ARGUMENT TO THE JURY PREJUDICED DEFENDANT, UN-FAIR TRIAL

V

Direct evidence is positive proof. Fingerprints of a Defendant at the scene is regarded as proving that he was there.

"Live fingerprints" were lifted from the Teller's cage of the bank of which Henry is accused of robbing. These fingerprints were not Henry's. (FBI Lab Report.) However, Mr. Sims made statements to the Jury in his closing Argument that,

> "Billy Gale Henry is the Big Man who went in the Bank, gashed Mr. Woodcock's head, and took the money."
>
> "Henry is the Big Man.
>
> "The Cellmates told the truth."
>
> "Left no fingerprints."

These statements are statements of fact—this is testimony—not from the witness stand, but from a person who does not know.

Mr. Sims said no fingerprints were left—but fingerprints were left, and he knew they were not Henry's.

And it is a fact that these prints were the prints of the man who went into the bank and did the things Mr. Sims accuses Henry of doing.

While the U.S. Att. Sims has lots of room to address the jury—he is not allowed to state facts that were not testified to in court. Not one witness said they saw Henry at the bank, Not one said he was even in Virginia on the day of the crime.

The Government stated flatly that Henry was the man who entered the Teller's Cage, gashed Mr. Woodcock's head, took the money. This is not proven—to state repeatedly to the jury is to abuse his privilege.

Mr. Woodcock said he couldn't tell if the man was black or white.

Mr. Sims also, said, "they're pros, they're organized, left no fingerprints.

"This was a pro operation."

All of these statements by Mr. Sims were very prejudicial to the Defendant. Mr. Sims cannot be allowed to say anything beyond what was proven, and to use household words of organized crime and professional criminals is to prejudice the Defendant in the eyes of the fact finders.

"Live fingerprints" are direct evidence that this Defendant was not the man who went into the Teller's cage . . . it is not a Fair Trial to allow the Mr. Sims to lie by saying these prints didn't exist, testify as if he were there and was a witness.

A New Trial is required.

NON-DISCLOSURE OF EXCULPATORY EVIDENCE FAVORABLE TO THE DEFENDANT . . . MATERIAL

VI

The Government had agreed to furnish all scientific test result, fingerprint test results—the statements of the Defendant, the statements of the accused, the conviction records of the prosecution witnesses—and in general, the

Court ordered the U.S. Attorney to furnish all evidence favorable to the Defendant. None of this came to pass . . .

To this day there is evidence in the record favorable to the Defendant, which was never known about by the Defendant—the only evidence disclosed to the Defendant has been incriminating. Evidence of exculpatory nature, known of is:

1. Statement of the Defendant.
2. Statement of the Accused.
3. "Fingerprint test results."
4. Conway as a material witness.
5. two other witnesses known to Petitioner as "Joey" and Robert.

All of this was recoverable before trial—but not known of and recoverable by the Defendant. The FBI and Government knew of all of the above evidence long before trial, and chose to suppress the material evidence and favorable information, rather than disclose.

The Government turned its head—which is denial of due process and a fair trial. The Defense made requests for all this information and much more at the Hearing on a "Bill of Particulars" and "Motion for Discovery" which had total agreement, but the Government lived a "lie" as it didn't keep the Discovery Order.

The case law on this point is endless. This pro se Petitioner doesn't have much up-to-date information, but controlling cases make it clear of the rule:

Brady v. *Maryland*, 373 U.S. 83

Giles v. *Maryland*, 306 U.S. 66

Barbee v. *Warden*, 331 F.2d 842

Clay v. *Black*, 479 F.2d 319 (1973)

U.S. v. *Polisi*, 416 F.2d 573

To clearly see the "area of ignorance" (where the Defendant was at trial) not one defense witness appeared . . . the trial is a quest for the truth . . . a penniless pauper cannot defend himself against a wealthy and well oiled prosecution team if he doesn't even have due process of law and a fair trial. "A NEW TRIAL IS REQUIRED."

INCOMPETENCE OF PETITIONER TO ASSIST COUNSEL and/or INEFFECTIVE COUNSEL

VII

The Defense has the responsibility to make timely motions, moves, and objections—the Court cannot "baby sit" the Defense needs and/or call attention to what it should do and when . . . without question, from the beginning of the trial process, that is pre-trial motions and hearings, the Defense of Henry has fell short of what it should have been.

Ralph Rabinowitz was appointed to represent the Petitioner. However, this attorney never visited the Petitioner—not one time. This is an excellent example of the non-interest and non-concern of the Defense Counsel.

INCOMPETENCE OF PETITIONER TO ASSIST COUNSEL

Henry was held in jail without proper medication for several months, and in fact given a "wrong medication" that caused him to lose his sense of awareness and ability to talk and speak on his own behalf. On his appearance before Judge Hoffman Henry spoke intelligently and with composure, months later, at the time of trial he let himself be "spun helplessly through a whirlwind of judicial procedure at the trial."

This in part, or whole, was ineffectiveness of counsel. If the counsel had been effective enough to protect the rights of his client, then being kept like this in jail, without medication on the day of trial, would not have been of consequences—however, if an indigent defendant is to be given counsel by Government appointment, it should not be allowed to fall short of due process of law.

In his rational mind, this Petitioner would not allow himself to be tried without a defense. *NOT ONE DE-*

FENSE WITNESS. NOT ONE VISIT FROM THE ATTORNEY.

INEFFECTIVE COUNSEL

U.S. v. *Smith*, C.A. 4th (1965) 353 F.2d 166. In this case it has a meaning that Appointed counsel is reason to review on claim of deprivation of Constitutional Rights.

The Fourth Circuit has strong ruling on their approach to the effectiveness of appointed counsel. In the instant case, their rules call for an evidentiary hearing to review the case to establish whether or not the indigent defendant was given a fair trial with his rights to due process of law.

MEMORANDUM OF POINTS OF LAW

1. PERJURED TESTIMONY—GOVERNMENT'S WITNESS SADLER "PLANNED PERJURY REVEALED"

> "A new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the Jury." *Giglio* v. *United States*, 405 U.S. 150.

Giglio ruled that the jury should know if the credibility of the witness is at issue. Here the jury was entitled to know of Sadler's conversation with Conway. Sadler planned to commit perjury and had an ulterior motive.

> *U.S.* v. *Polisi*, 416 F.2d 573, (CA2)
> "When a conviction is shown to be based even in part upon perjured testimony, this Court should not merely inquire as to the peruse effect of the perjury, but should order a new trial if without perjury the jury might have not convicted.

> *Miller* v. *Pate*, 386 U.S. 1 (1967)
> "If the Government knows that a piece of evidence is false or that a witness is perjuring himself or is unreliable, it has a duty not to use such evidence in order to gain a conviction.

> *Napue* v. *Illinois*, 360 U.S. 264
> "the same result obtains when the state though not soliciting false evidence, allows it to go uncorrrected when it appears."

Sadler was a devious and deceptive tactic by the Government. Conway's affidavit explains the ulterior motive of perjury, the Government knew of Conway —the arranged his transfer.

2. GOVERNMENT'S WITNESS NICHOLS WAS A PAID INFORMER WHO VIOLATED "MASSIAH RULE"

Government's witness Edward B. Nichols has been a paid informer prior to the Henry case, and has since that time worked for the FBI as an informer, gathering information as an "arm of the law" and under the "color of law enforcement."

The FBI used their influence to obtain Nichols release and then sent him to visit the Petitioner in the Norfolk City Jail and the Portsmouth City Jail to ask the Petitioner questions about the crime he was indicted for.

Petitioner had refused to talk to the FBI and they used "informer Nichols" to do something the FBI could not do, question the Petitioner—all of this without the presence of counsel.

Massiah v. *U.S.*, 377 U.S. 201 says that the Supreme Court held that statements of an accused deliberately elicited from him in the absence of counsel after he had been indicted are inadmissible.

The "MERE PRESENCE" of Nichols on the witness-stand was prejudicial to the Petitioner, and this is denial of due process and a fair trial.

3. FBI AND U.S. ATT. USED DECEPTION ON THE COURT, DEFENDANT AND THE JURY

4. VIOLATION OF THE COURT'S DISCOVERY ORDER—DENIAL OF DUE PROCESS AND FAIR TRIAL

The "case law" on these two points is endless. I'll not burden the Court with quoting the cases . . . it is plain

and simple that the defendant is denied due process and a fair trial.

Brady v. *Maryland*, 373 U.S. 83
Giles v. *Maryland*, 386 U.S. 66
Berger v. *U.S.*, 295 U.S. 75
Miller v. *Pate*, 386 U.S. 1 (1967)
U.S. v. *Augenblich*, 393 U.S. 348
Napue v. *Illinois*, 360 U.S. 264
U.S. v. *Polisi*, 416 F.2d 573
U.S. v. *Bryant*, 439 F.2d 642

The evidence and/or information sought on discovery, and that was used in the deception by the FBI and the Asst. U.S. Attorney was of material value to the defense. The Defense had absolutely no idea of what evidence was against the Defendant, except that he had been identified as having rented a house where two bank robbery suspects had been arrested. The Defense ws crippled by the failure to disclose.

Having the Discovery Order from the court regarding "Statements of the Defendant and/or Accused"—when none were produced left the Defense with the opinion that none existed. Had the Government stated flatly that statements existed, but refused to disclose them would have been sufficient notice of evidence of this nature. But, *the agreement to furnish statements, and then not producing them was and is, DECEPTION—ON THE COURT*, AND *JURY*.

No direct evidence has ever been produced that put the Defendant at the bank, or robbing the bank. No witness places the Defendant in the State of Virginia within several days of the crime. The ulterior motive of the Deception and Non-Disclosure was to use the hearsay evidence of the Two ex-cellmates to place the Defendant in Norfolk on the day of the Robbery.

This Honorable Court can see through this tactic—and know that this is and was denial of due process of law, and therefore, denial of a fair trial. An evidentiary hearing is required to allow Petitioner to prove these facts.

5. ASST. U.S. ATT.'S Argument to Jury was PREJUDICE to DEFENDANT; UN-FAIR TRIAL

Gradsky is a case, but this Petitioner doesn't have the citation to identify it. However, it says that a statement of the prosecuting attorney vouching for the credibility of the Government witnesses was prejudicial error which may have contributed substantially to conviction.

In the instant case, Asst. U.S. Attorney made this statement in his argument to the jury,

"The cellmates told the truth."

This was in reference to the two "convicted felons" who were ex-cellmates of the Petitioner, Joseph D. Sadler and Edward B. Nichols, who informed to the FBI, and stated that Petitioner had told them about the bank robbery.

Prejudicial!!! This was a foul blow to the Defendant. It is true that this statement should have been objected to . . . but in view of the ineffectiveness of counsel, and the incompetence of the Defendant who had not had medication when he had it prescribed for him. The medication Petitioner received was wrong, but on the day of the trial, and late in the day, he repeatedly asked for medicine and only received aspirin.

Mr. Sims, the Government's attorney, made many other prejudicial remarks: which were not facts of testimony from the witness-stand or evidence, so the remarks were actually testimony from Mr. Sims who was not a sworn witness, such as: "Billy Gale Henry robbed the bank." "Henry was the Big Man in the teller's Cage." "Billy Gale Henry went in the bank, gashed Mr. Woodcock's head, fired shots . . . took money."

Mr. Sims did not know this. He vouched for the ex-cellmate. No witness had identified Henry at the bank, Mr. Woodcock said he couldn't tell if it was a black man or a white man. But Mr. Sims took the liberty of un-sworn testimony and said Henry was the Big Man in the teller's cage. He also said in this argument to the Jury, "they left no fingerprints."

Actually there were fingerprints left in the teller's cage where he said Henry had been as the robber who gashed Mr. Woodcock's head.

The "Live fingerprints" were not Henry's. The FBI testified to this at Trial. Mr. Sims knew this, it was his case from the start of prosecution. He repeatedly made all of these statement and more about the crime being professional criminals.

King v. *U.S.*, 372 F.2d 383. This case says, it is misconduct for a prosecutor to make an assertion to the jury of a fact, either by way of argument or by assumption in a question, unless there is evidence to the fact.

Mr. Sims used his argument as un-sworn testimony to prejudice the Defendant with other remarks,

> "They're in; they're out, . . . it's a pro operation. They're organized."

This is and was un-sworn testimony. This is to say the Defense was not allowed to cross-examine the witness against him. *Barber* v. *Page*, 390 U.S. 719 (1968).

6. NON-DISCLOSURE OF EXCULPATORY MATERIAL EVIDENCE—FAVORABLE TO DEFENDANT, petitioner

Points of law is endless. . . . and the same relative point is that when the FBI and Government agreed to furnish the favorable information and evidence, not having furnish it, left the Defense of the opinion that none existed.

Brady v. *Maryland*
Giles v. *Maryland*
Barbee v. *Warden*
Clay v. *Black*
U.S. v. *Polisi*

The absence of objection is in that the counsel for the indigent defendant was less than adequate counsel, and appointed by the Government.

Denial of due process of law and denial of a fair trial, a new trial is required.

7. INCOMPETENCE OF PETITIONER TO ASSIST COUNSEL and/or INEFFECTIVE COUNSEL, App.ted.

Petitioner has only one case at hand—the law facilities are limited here. *U.S.* v. *Smith*, C.A. 4th (1965) 353 F.2d 166.

This is to say that appointed counsel is reason to review on claim of deprivation of Constitutional Rights.

The Petitioner, as mentioned before, had been kept in jail for a long period of time, had had hearings in your court relative to medication with testimony from the Jail doctor—and Petitioner was not of rational state of mind that he could assume leadership of the Defense Counsel in a U.S. District Court on a charge of bank Robbery.

On arrest, the Petitioner had no money and had to rely on the Government for appointed counsel, at no time did the Court make him aware that he was individually responsible for the attorney's performance—that if the appointed counsel was ineffective that the Defendant is legally denied due process of law and denied his rights to a fair trial.

If a new trial is granted, this Petitioner will assume this responsibility—with warning in open court—but, as the case stands now, the ineffectiveness of the appointed counsel was the product of the lackadaisical attitude of his approach to defending his client.

Not one visit from the appointed counsel. Not one defense witness. No defense.

PRAYER

Petitioner prays this Honorable Court will vacate and set aside the conviction and remand for an evidentiary hearing, because:

1. Perjured Testimony of Government's witness Sadler was revealed as planned perjury.
2. Government's witness Nichols was a paid informer who violated Massiah Rule.

3. FBI and U.S. ATT. Sims used deception on the Court, defendant and the Jury.
4. Violated the Court's Discovery order—denied due process, and a fair trial.
5. Non-disclosure of exculpatory material evidence—favorable to the Defendant.
6. U.S. Attorney's Argument to Jury was prejudice to Petitioner, un-fair trial.
7. Incompetence of Pet. to assist Counsel and/or ineffective counsel.

Any one of the points on this brief is enough to reverse and/or vacate the sentence—but, the compilation of the denials of due process of law, and a fair trial is enough to require that the sentence be vacated.

Respectfully submitted,

/s/ Billy Gale Henry
BILLY GALE HENRY, pro se
P.O. Box 1000
Leavenworth, Kansas 66048

Subscribed and sworn before me this 17 day of July, 1975.

/s/ Roger Stafford
Notary Public
ROGER STAFFORD
Parole Officer
U.S. Penitentiary
Leavenworth, Kansas 66048
Authorized by Act of July 7, 1955,
to administer oaths (18 U.S.C. 4004).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

NORFOLK, VIRGINIA

Civil Action Case 453-N-75

BILLY GALE HENRY, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

AMENDMENT OF THE COMPLAINT

by

Plaintiff, Prose

Bill Henry, Prose
Box 1000 # 02240-135
Leavenworth, Kansas
66048

Bill Henry, Prose
PO Box 1000
Leavenworth, Kansas
66048

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

NORFOLK, VIRGINIA

Case No. 453-N-75

BILLY GALE HENRY, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

AMENDING THE PETITION—3255 on REMAND

Plaintiff, Billy Gale Henry, moves this Honorable Court to vacate the sentence and set aside the conviction.

JURISDICTION

Jurisdiction is pursuant to 28 USC 2255, Motion to Vacate the sentence.

PLAINTIFF

Plaintiff, Billy Gale Henry, is an inmate of the U.S. Penitentiary at Leavenworth, Kansas; convicted in the U.S. District Court E.D./Va. in the court of the Honorable Richard Kellam, 243-72-H jury trial on 3/7/73. Plaintiff made a Motion for a new trial and was denied, appealed 1413-73 to the Fourth Circuit court of appeals and was denied, petitioned for a Writ of Certiorari S/C 74-5560 and was denied 4/14/75. Plaintiff is serving a twenty-five year sentence in custody of the U.S. Attorney General.

RESPONDENT/DEFENDANT

The United States of America, the United States Attorney General and the U.S. Attorney for the Eastern

District of Virginia are the Respondents for the United States of America.

STATEMENT OF FACTS

Petitioner was arrested November 1, 1972 by FBI agents in Atlanta, Georgia; transported to Norfolk, Virginia on November 20, 1972 where he was 'housed' in the Norfolk City Jail as a Federal prisoner charged with 2113 (a & d) for the Robbery of the United Virginia Bank, Seaboard/Branch in the Janaf Shopping Center Norfolk, Virginia on August 28, 1972.

Between November 20 and November 27, 1972 the Plaintiff and other inmates were switched around from different living units, the plaintiff being housed with several other inmates, namely Joseph D. Sadler, Edward B. Nichols, and Joseph Ray Conway. Sadler and Nichols were Agent/Informers for the FBI and later testified at the criminal trial of the Plaintiff Billy Gale Henry on 3/7/73.

On or about the 13th of December 1972 Henry and conway were transferred from the Norfolk City Jail—Henry being housed in the Portsmouth City Jail in Portsmouth, Virginia—Conway being sent to the State Prison.

December 27, 1972 Plaintiff was present in court on a Bill of Particulars and a Motion for Discovery and Inspection—both of which were written Motions before the court, The open Court Hearing was transcribed.

February 7, 1973 a Suppression Hearing was held relative to a residence where two bank robbery suspects had been arrested the day of the crime. The lease agreement of this residence having been found in the getaway car—the Petitioner (Henry) having been identified as the individual who had leased the house. At this same hearing the Jail Doctor and the Plaintiff gave testimony relative to the treatment of the Plaintiff in the Portsmouth City Jail.

At Plaintiff's trial 3/7/73 the Government presented approximately 24 witnesses to prove the Plaintiff was the "Third Man" who had not been apprehended the day of the crime. Two robbers had entered the bank while one

waited in a getaway car, $84,000.00 was taken after one robber jumped the counter, struck a teller and took 44 night deposit bags. Plaintiff is serving 25 years in custody.

STATEMENT OF THE CASE

August 28, 1972 the crime at bar was committed by three (3) men. Two suspects were arrested the same day as a result of a 'lease agreement' being found in the getaway car. The residence had been leased by a 'Allen R. Norris.'

September 12, 1972 it was learned that Billy Gale Henry had used the name of 'NORRIS' and Billy Gale Henry (Plaintiff) was identified as having leased the residence.

September 22, 1972 a Complaint was filed and an Arrest Warrant isued. The affidavit supporting the Arrest Warrant contained the following facts:

1. Henry used the name of 'Norris.'
2. Henry leased the residence where two suspects (Luck and Moore) were arrested the same day of the crime.
3. A copy of the lease agreement was found in the Getaway car—Henry's fingerprints were found on the lease agreement.
4. Henry was an associate of Luck and Moore—Citizens having seen them together in the Norfolk Area.

(Probable Cause Did Not Exist . . . An Arrest Warrant should not have been issued)

November 1, 1972 Plaintiff (Henry) was arrested in Atlanta, Georgia pursuant to the above Arrest Warrant.

November 15, 1972 a Federal Grand Jury indicted Billy Gale Henry for the bank robbery.

November 20, 1972 Plaintiff arrived in the Norfolk, Virginia U.S. Marshal's Office and placed in a 'Hold Over' cell. FBI Agent N.V. O'Hara came into the Marshal's Office to get information from the Plaintiff (Henry) about the bank robbery of which Henry was already indicted. O'Hara opened conversation with the Plaintiff without the presence of counsel, and without an intelligent waiver of counsel. O'Hara obtained an agreement to interview Henry about the crime (Post-indictment) and learned that Henry had known Moore for a long time. (Denied the Right to Counsel—Absent an intelligent waiver of right to counsel.)

November 20, 1972 the Plaintiff was 'housed' in the Norfolk City Jail on instructions from Agent O'Hara. During the first week Henry was moved to a small Unit, on the same day an Agent/Informer for the FBI, Edward B. Nichols, was moved to the same unit. The Agent/Informer, Nichols, gathered statements of conversation from the Plaintiff (Henry) and passed the statement to the FBI Agents. Shortly thereafter Nichols was released from the Norfolk City Jail, partial payment for the paid informer for the FBI who had gathered statements from the Plaintiff who did not have counsel present and had not intelligently waived his right to counsel.
(Denial of the Right to Counsel—Absent an intelligent waiver of right to Counsel)

November 27, 1972 Joseph D. Sadler was moved into the same Unit of the Norfolk City Jail with the Plaintiff and Edward B. Nichols. When Nichols was released from jail, Nichols returned to the Jail to visit Sadler and Henry. On the visits to Henry Agent/Informer Nichols would question Henry about the case.

December 12, 1972 Joseph D. Sadler called the FBI Agents and told them he had information in the form of incriminating statements made by the Plaintiff (Henry). Agents interviewed Sadler and as a result of this interview Henry was moved from the Norfolk City Jail to the Portsmouth City Jail.

Joseph Ray Conway was also moved from the Norfolk City Jail: It was learned after the Henry trial on 3/7/73 that Conway knew that Sadler planned to commit perjury at the Henry trial. The FBI knew of Conway and had Conway moved to the State Prison, even though Conway faced additional charges in Virginia Courts.

Sadler had told the FBI Agents that the Plaintiff (Henry) had admitted robbing the bank at Bar: Repeating statements allegedly made by Henry. In conversation with Conway, Sadler had told Conway that Henry had never admitted robbing the bank but that he would say anything on the witness-stand to get out of jail. (Knowing Use of Perjured Testimony—Perjury by a Material Witness to Convict) SUPPRESSION OF EXCULPATORY EVIDENCE

December 12, 1972 Henry was housed in the portsmouth City Jail where he (Henry) was not given proper medication, and exposed to the following Jail conditions:

a. An overdose of medication that should not have been given at all.

b. Jail Physician refused to give Henry proper medicine and medical care.

c. Committed to 'Solitary Confinement' by Doctor as treatment

d. Interrogated by an Agent/Informer (Nichols) who gathered statements of the Plaintiff without the presence of counsel, and absent an intelligent waiver of the right to counsel.

(Competency to stand trial destroyed by cruel and unusual punishment, jail conditions)

December 27, 1972 at a hearing on a Bill of Particulars and Motion for Discovery and Inspection there was an agreement relative to incriminating statements if any such statements existed: The Government's Counsel agreed to furnish:

a. Statements of the Defendant
b. Statements of the Accused
c. Rap-Sheets of Prosecution Witnesses
d. All favorable information to the Defense. (Brady Material)

None of the above was furnished—even though all of the above existed. Failure To Disclose is Saying None Exist. (Non-Disclosure of Material Evidence Favorable to the

Defendant—Violation of the Court's Discovery Order—Suppression of Exculpatory Evidence, Material.)

February 7, 1973 the Jail physician, Dr. Barclay, was subponead to testify in regards to the treatment of the Plaintiff (Henry). Henry also testified. On direct Examination Henry testified he suffered from a degree of insanity. The Defense Counsel expressed a need for Henry, stating that Henry should be examined by a Specialist. The Court ordered that Henry would be allowed to pay a doctor/s/ to visit him, but the Government's duty met by the Jail Doctor.

Two doctors, one a specialist, visited Henry at Henry's expense, the specialist furnished the court a report. The second doctor prescribed medication which was not allowed by the Jail physician, Dr. Barclay.
(A Competency Hearing should have been ordered on Defendant's stating Insanity)

March 7, 1973 at the Henry criminal trial, the Government's Counsel presented both Agent/Informers Nichols and Sadler. Both witnesses were material in value to the Government's Case.

Both Nichols and Sadler were a complete surprise to the Defense. The Defense had no knowledge of Joseph Ray Conway—the person in the cell with Sadler and Henry who had heard Sadler say that he would testify to false incriminating statements of Henry.

The alleged statements of Henry were unknown to the Defense until the trial; therefore, the Government's failure to Disclose as they had agreed at the Hearing 12/27/72 Motion for Discovery had become a material factor.

In conclusion of the "statment of the case," we see the following:

1. Probable Cause did not exist . . . An Arrest Warrant should not be issued.
2. Denied the right to counsel . . . when O'Hara interviewed in Marshal's Office.
3. Denied the right to counsel . . . when Agent/Informer Nichols gathered statements of the Plaintiff in the Norfolk City Jail, and visits.

4. Knowing Use of perjured testimony (Sadler) Suppression of exculpatory Evidence due to the moving of Henry and Conway—to separate all three.
5. Competency to stand trial destroyed by Jail conditions.
6. Non-Disclosure of material evidence (Henry Statements) Violation of the Court's Discovery order (furnishing the statements, rap sheets, Conway, and other Brady Material)
7. Suppression of material evidence—through Non-Disclosure.
8. A Competency Hearing should have been ordered—Due to the Defendant's statements of suffering a degree of insanity, and the Defense Counsel's statements that the Defendant should see a specialist of some sort.
9. Illegal search of the Wailes Avenue
10. Illegal sentence when sentenced as a special offender without due process.

PERJURED TESTIMONY

The Government used perjured testimony from an excellmate, Joseph D. Sadler, who called the FBI 'In relation to his case,' not as his public spirited duty. Before Sadler called the FBI he discussed the conspiracy with one of his friends in the jail cell, other than the Plaintiff. This sworn statement was taken after the Plaintiff's trial.

SUBSCRIBED AND SWORN TO UNDER OATH by JOSEPH RAY CONWAY

April 13, 1973

"I met Mr. Sadler at the Norfolk City Jail, and got very close as a friend. We were in the same cell as Bill (Billy Gale Henry), and we talked together quite a lot. One night, Mr. Sadler told me he couldn't

stand going back to prison. I asked him how he could keep from going, he told me that he would tell the FBI that Henry robbed the United Virginia Bank of Janaf Shopping Center. I said, 'but Billy has never admitted robbing no kind of bank.' Sadler said, 'I know, he never admitted it, but I'll tell this to the FBI and they'll keep me from going to prison.' I said, 'That is a hell of a way to keep from going back,' and he said, 'I have a lot to look forward to on the street, and I will do anything to get back out there.'"

At the trial Sadler testified to and repeated statements of conversations made by Henry allegedly implicating himself (Henry) in the bank robbery. On cross-Examination Sadler didn't know "what city the bank was in, (Sadler saying Virginia Beach, Virginia; in contrast to Norfolk, Virginia) (TR 141) Sadler didn't know how many robbers were involved, or how the robbery was carried out; in confusion Sadler told a 'Fairy tale' about a woman driving the car, and a robber standing on the sidewalk outside the bank. A description of a robbery which didn't fit the facts of the case, as a private citizen had witnessed the robbery from only a few feet and described only three men involved—and this witness who did not have an ulterior motive to fabricate, said Henry didn't look like anyone he could identify.

At TR. 143 when Sadler was asked if he received any promises for his testimony, he said, "No."

Q. How did you contact the FBI with this testimony?"

A. "How did I contact the FBI? I called the FBI Agents."

Q. "You did this —"

A. "Yes Sir."

Q. "As your public spirited duty?"

A. "In relation to my case.

"It was through the advise of my attorney."

Q. "Who is your attorney?"

A. "Mr. Abraham."

When the Plaintiff contacted Mr. Abraham, Attorney Abraham stated in a letter to the Plaintiff, ". . . I do not recall having discussed you with Mr. Sadler. On checking my file I find no mention of you whatsoever."

Sadler was not a federal prisoner—Sadler faced more than 20 charges in the Commonwealth of Virginia, but no federal charges.

"In relation to his case," can only mean he wants to make a deal.

"It was through the advice of his attorney," is a lie. Mr. Abraham would have made a note of any advise such as testifying in Federal court.

The Plaintiff states under oath of this petition that he did not tell Sadler that he (Henry) robbed a bank. The testimony by Joseph D. Sadler is perjured testimony by a material witness.

> *Napue* v. *Illinois*, 360 U.S. 264
> *Giglio* v. *United States*, 405 U.S. 150
> *Moore* v. *Illinois*, 408 U.S. 798

Sadler's testimony was material—this was the only evidence linking the Plaintiff to the scene of the crime, or in the presence of the other suspects in the case. Sadler bargained with the FBI and received rewards for his services rendered.

KNOWING USE OF PERJURED TESTIMONY—

Material Value

The FBI is a professional investigative agency—from their interviews with Sadler they would have known, or should have known, that it was a fabrication of a "Fairy Tale" by a desparate person wanting out of jail.

—FACTS OF THE CASE—

Sadler didn't know the facts of the case: if Sadler had alleged that four people were at the scene of the crime, that a man stood by the door of the bank during the robbery, that a woman drove the car; they would not

have believe Sadler, unless they chose to 'ignore the false information.' And allow the false testimony to be presented.

The transferring of Henry (Plaintiff) and Conway away from the Agent/Informer Sadler; was to hide the existence of Sadler. The separation of Conway and Henry was to hide Conway from Henry.

JOSEPH RAY CONWAY

Conway was a trustee in the Norfolk City Jail who was painting the entire inside of the jail. He had been there for approximately one year, he faced other charges in the Virginia courts: The transferring of Conway was to facilitate the Federal Authorities. Sadler told the FBI something, or some sort of story to prompt them to transfer Conway.

Even the jailers were not aware of the conspiracy against Henry—the deception and hiding of witnesses was an ulterior motive to expose Henry to an unfair trial. The government knowing used perjury.

> *Miller* v. *Pate*, 386 U.S. 1 (1967) "If the Government knows that a piece of evidence is false or that a witness is perjuring himself or is unreliable, it has a duty not to use such evidence in order to gain a conviction."

The FBI knew that Sadler gave false testimony, the Government's attorney too; it was their duty not to use this unreliable person.

> *Napue* v. *Illinois*, 360 U.S. 264 ". . . the same result obtains when the (Government) though not soliciting false evidence, allows it to go uncorrected when it appears."

Plaintiff submits the Motion to Vacate the sentence should be granted.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORFOLK

Norfolk, Virginia 23510

CHAMBERS OF
RICHARD B. KELLAM
CHIEF JUDGE

August 30, 1977

Roger T. Williams, Esquire
Assistant U.S. Attorney
P.O. Box 60
Norfolk, Virginia 23501

Re: Billy Gale Henry v. United States
Civil Action No. 75-453-N
(Cr. #243-72-N)

Dear Roger:

The Fourth Circuit remanded the above case for determination of the issue of information allegedly furnished by informers for the FBI, who allegedly were cellmates of Henry.

Earlier, I issued an order directing the parties to furnish affidavits to establish any facts they thought pertinent. I believe I can dispose of this matter without the necessity of a public hearing.

It is, therefore, requested that you furnish affidavits of the FBI agents involved in this investigation as to whether or not the alleged cellmates of Henry were employed by the FBI to question him or obtain information for them. The affidavit should also deal with the issue of whether the agents in any way sought to have Henry jailed, either at Norfolk or Portsmouth, and whether they took any part in attempting to have the alleged cellmates transferred from one jail to another. A reading of the complaint would clearly point out the issues which he raised. I believe the cellmates were Sadler and Nichols. I would appreciate it if you would

arrange to have these affidavits filed, with copies to plaintiff, within 10 days.

If, by chance, the agents did request Sadler or Nichols to interview Henry, we probably will have to grant a hearing.

Thanking you, I am

Very truly yours,

/s/ Richard B. Kellam
RICHARD B. KELLAM
United States District Judge

RBK/aw
Dictated by Judge Kellam,
signed in his absence.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 75-453-N

(CR. # 243-72-N)

BILLY GALE HENRY, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

AFFIDAVIT

I, Nicholas V. O'Hara, being duly sworn, depose and say as follows:

(1) I am a Special Agent (SA) of the Federal Bureau of Investigations (FBI), assigned in a supervisory capacity to the Planning and Inspection Division, Federal Bureau of Investigation Headquarters (FBIHQ), Washington, D.C. I was formerly assigned to the Norfolk Virginia, Division of the FBI and am aware of the issues being raised by plaintiff in this matter. I participated in the investigation of the bank robbery of the United Virginia Bank/Seaboard National, Janaf Office, Norfolk, Virginia, which occurred August 28, 1972, in which plaintiff was identified as a participant.

(2) I am aware that SA Gerald T. Coughlin obtained information from an informant which directly related to the participation of Billy Gale Henry in the bank robbery of August 28, 1972, mentioned above. To my knowledge, this informant was not directed at any time to solicit information from Mr. Henry either by myself or SA Coughlin. Due to the fact that this investigation was assigned to me, SA Coughlin and I closely coordinated each aspect of the case relating to the informant to insure all information obtained was done so with due regard for all legal considerations.

(3) On February 28, 1973, I interviewed Joseph D. Sadler at the Norfolk, Virginia, City Jail. Mr. Sadler furnished information to me which had been volunteered to him by Mr. Henry. At no time did I direct Mr. Sadler to seek out Mr. Henry and obtain information for myself or the FBI in connection with any criminal activity of Mr. Henry.

(4) I did not contact any Norfolk or Portsmouth, Virginia, jail authorities to arrange for any particular cellmate to be placed with Mr. Henry or to arrange transfers for Mr. Henry. All such accommodations are handled by the United States Marshals Office, and I did not make any such contact with any member of the U.S. Marshals Office in that regard.

/s/ Nicholas V. O'Hara
NICHOLAS V. O'HARA
Special Agent
Federal Bureau of Investigation
Washington, D.C.

Subscribed and Sworn to before me this 7th day of September, 1977.

/s/ Illegible
Notary Public

My commission expires September 14, 1981

SUPREME COURT OF THE UNITED STATES

No. 79-121

UNITED STATES, PETITIONER,

v.

BILLY GALE HENRY

ORDER ALLOWING CERTIORARI

Filed October 1, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 305244 123